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NO. ________

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,
Petitioner,

V.

ROGACIANO GONZALES MENDOZA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

KATHLEEN D. MIX
Sr. Assistant Attorney General
WSBA #07453
Counsel of Record

JOHN SCOTT BLONIEN
Assistant Attorney General
WSBA #11344

DANIEL J. JUDGE
Assistant Attorney General
WSBA #17392

Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, Washington 98504-0116
(206) 586-1445

QUESTION PRESENTED FOR REVIEW

Should this Court clarify the application of the rule pronounced in *Hewitt v. Helms* and hold that prison regulations which do not affect the duration of, or release from, confinement do not create an entitlement protected by the Due Process Clause regardless of the mandatory character of the language used or the limits placed on official discretion?

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PARTIES

The parties to this proceeding are Petitioners, James Blodgett, former Superintendent, Washington State Penitentiary, now Deputy Director of the Division of Prisons, Washington State Department of Corrections; Gary Edwards, Correctional Lieutenant, Washington State Penitentiary; Edith Jones, Corrections Officer; Ron Van Boening, Associate Superintendent, Washington State Penitentiary; Jack Lambert, Associate Superintendent, Washington State Penitentiary; and Lawrence Kincheloe, former Director of the Division of Prisons, Washington State Department of Corrections, and current Superintendent of Spring

Creek Corrections Center, Seward, Alaska. The above parties were aligned as Defendants below.

Respondent: Rogaciano Gonzales Mendoza, an inmate serving a sentence in the Washington State prison system, was aligned as a Plaintiff below.

REFERENCE TO REPORTS AND OPINIONS DELIVERED IN THE CASE

The United States District Court for the Eastern District of Washington entered an order granting Defendants' motion for summary judgment on February 7, 1991, under cause no. CV89-770-JBH. The court's ruling on this matter is unpublished. The Ninth Circuit Court of Appeals filed its opinion on April 1, 1992. The Ninth Circuit filed an amended opinion April 28, 1992. The court's opinions are published. *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992) (as amended).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its decision on this matter April 1, 1992, under cause nos. 91-35303 and 91-35305. The court filed an amended opinion under the same cause numbers. Under these cause numbers, Defendants timely filed a petition for rehearing and a suggestion for rehearing *en banc* on or before April 10, 1992. The Court of Appeals filed an order on June 1, 1992 in which the panel unanimously denied the petition for rehearing and rejected the suggestion for a rehearing *en banc*. This Petition for Writ of Certiorari is timely filed within ninety (90) days from the order of the Court of Appeals entered June 1, 1992 (90 days would expire on Sunday, August 30, 1992 and would extend by rule to the next business day, Monday, August 31, 1992).

The district court, Court of Appeals, and this Court have federal subject matter jurisdiction over this matter under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and § 1343(4). Petitioners invoke this Court's jurisdiction to review the opinion of the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, Sec. 1 (emphasis added).

Regulations.[1]

1. Institutional Order (IO) 16.020
2. Institutional Order (IO) 09.053
3. Washington State Penitentiary (WSP) Policy 420.311
4. Washington Administrative Code (WAC) 275-80-810, 842, 846, 925-940.

Statutes.

1. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings.

This case was filed on or about December 5, 1989, pursuant to 42 U.S.C. § 1983 by inmate Rogaciano Mendoza, who is incarcerated at the Washington State Penitentiary (hereinafter WSP or the Penitentiary) at Walla Walla, Washington. The Plaintiff complained that his rights under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth

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[1] The contents of these regulations are provided in the Appendix.

Amendments were violated when he was placed on "dry cell watch"[2] and visits with his family were suspended because he was suspected of smuggling drugs into the institution. The Plaintiff also alleged various state claims, over which the district court refused to exercise its pendant jurisdiction.

By orders of the district court filed December 21, 1990 and February 7, 1991, the district court granted summary judgment to the Defendants. However, the court held that the WSP dry cell watch and visiting policies establish a state created liberty interest, entitling the Plaintiff to procedural due process. The court found that the visiting policy contained sufficient procedural protections; however, the dry cell watch policy did not. The Defendants were granted qualified immunity on the due process claim regarding the dry cell policy. The district court dismissed Plaintiff's claims under the First, Fourth, Eighth, and Ninth Amendments. Plaintiff has not appealed the district court's dismissal orders as to these claims. Appendix at A-27.

The Plaintiff appealed from the court's entry of judgment in the Defendants' favor, solely on Plaintiff's claims under the Due Process Clause. The Defendants cross-appealed from the finding that the two WSP policies at issue entitled the Plaintiff to any or additional due process protections. *Mendoza*, 960 F.2d at 1427.

On appeal, the Ninth Circuit Court of Appeals affirmed the decision of the district court. The Court of Appeals found that the dry cell watch policy of WSP granted Mr. Mendoza a state-created liberty interest. The Court found a liberty interest even though the superintendent was not required by the policy to place the inmate on the dry cell watch, and even though placement of an inmate on dry cell watch was based upon a reasonable suspicion that the inmate was secreting contraband.

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[2] A dry cell watch or feces watch refers to a procedure governed by a policy which permits the superintendent or his designee to place an inmate in a custody-locked cell in the WSP Hospital, with the toilet and sink facilities turned off, for the purpose of inspecting at least three bowel movements for the presence of contraband, usually drugs.

The Ninth Circuit Court applied the tests set forth by this Court in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989); and *Olim v. Wakinekona*, 461 U.S. 238 (1983), in determining that a state created liberty interest existed under the policies and procedures governing dry cell watches and visitation. The Court also relied upon its own holding in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986).

The Court of Appeals also found that the visitation policies of WSP granted Mendoza a state-created liberty interest in visitation in general, but did not address whether these policies granted the inmate a state created liberty interest in visiting with a specific individual. In arriving at this decision, the Court relied upon all of the policies governing visitation as a whole, rather than the single policy and procedural regulation which limits visits with particular individuals. *Mendoza,* 960 F.2d at 1433.

The Court held that even though the policies and regulations governing visitation granted the inmate a state-created liberty interest, Mendoza's procedural due process rights were not violated in this case. The Court rejected Mendoza's arguments that he was entitled to a finding of guilt from a disciplinary hearing before his wife and children were temporarily removed from the WSP approved list of visitors. Here, however, the Court distinguished between the removal of the visitor's name from the list and the denial of visits as a whole. *Id.* Previously, the Court failed to make this distinction when it found that the visitation policies granted a state-created liberty interest. *Id.* at 1431-32.

Relevant Facts.

Plaintiff, Rogaciano Mendoza, is incarcerated at the Penitentiary at Walla Walla, Washington, and was incarcerated there on September 29, 1989, during the events alleged in his Amended Complaint.

On September 29, 1989, the Plaintiff received a contact visit from his wife and six (6) children. At approximately 6:45 p.m., while Officer Edith Jones was preparing to escort the Mendoza children to the restroom, she noticed on the floor a balloon covered with a white slimy substance with the tip bitten off. From the start of the visiting session, an hour and fifteen minutes earlier, no one had been in that area. In addition, prior to the appearance of the Mendoza children, there was no balloon on the floor. Officer Jones informed the shift lieutenant of her findings. *Mendoza*, 960 F.2d at 1427.

The shift lieutenant in turn contacted Associate Superintendent Jack Lambert, the superintendent's designee, and informed him of the situation. Based on this information and upon Lambert's experience, Mr. Lambert believed that Mr. Mendoza had ingested a balloon or balloons filled with narcotics. As such, Associate Superintendent Lambert authorized Mr. Mendoza's placement on dry cell watch. Mr. Mendoza received an infraction for his conduct which was later expunged. His wife lost visiting privileges for a limited period of time. *Id*. at 1427-28.

Plaintiff was placed on dry cell watch at 8:40 p.m. in room 322 of the WSP Hospital on September 29, 1989, and was released from the watch at 8:41 p.m. on September 30, 1989. *Id*. at 1428.

The Plaintiff was placed on dry cell watch pursuant to WSP Institutional Order 09.053 (IO), attached in Appendix G. This policy permits, but does not require, the superintendent or his designee to initiate dry cell watch procedures. In the alternative, this procedure also permits the superintendent to do nothing or allow other search procedures. An inmate may be placed in a dry cell when the superintendent has reasonable suspicion to believe that the inmate has ingested contraband or inserted it into the rectal cavity. The length of confinement is normally 84 hours or less, although

24 hour extensions may be granted. Appendix at G-2; *Mendoza*, 960 F.2d at 1431, n. 6.

The policy requires that the institution take certain steps to assure the integrity of the dry cell procedure. The inmate is placed in the cell wearing only his shorts. The temperature is set at a comfortable warm temperature and monitored, and an insulated top may be issued. The inmate is not permitted to leave the cell or possess any personal property. However, a mattress is provided. Personal hygiene items are also issued three times a day. Waste is collected in a bedpan, inspected by custody staff, and disposed of by medical personnel. *Id.* at 1430, n. 5; Appendix at G-4-5.

Staff observe the inmate at all times and keep a log of the events that occur during the watch. Each watch officer is on a four hour shift and a senior officer is to make rounds at least once during each officer's watch. The cell and the inmate are to be searched at least once every eight hours. Appendix at G-4.

Superintendent Blodgett investigated the infraction that had been issued to Mendoza as a result of the incident in the visiting room. He determined that it was substantiated that the balloon was found on the floor in the visiting room in the area of the Mendoza children and that no one had previously been in that area. Because Ms. Mendoza had previously been involved in attempting to smuggle contraband into the institution through her children, the Superintendent removed Ms. Mendoza's name from the list of approved visitors for ninety (90) days. Although Superintendent Blodgett believed that an attempt had been made to smuggle contraband to Mr. Mendoza, he dismissed the infraction against him, concluding that Mr. Mendoza may not have been directly involved in the smuggling attempt. *Mendoza*, 960 F.2d at 1428.

The superintendent removed Ms. Mendoza and her children from the list of approved visitors pursuant to WSP Institutional Order 16.020, attached in Appendix F. The policy provisions governing termination or suspension of visits are set forth at pages F-6 thru F-9. Nine specific circumstances are listed, the occurrence of which allow, but do not mandate, the suspension of visiting privileges. In addition, the superintendent may remove the name of a visitor from the list of approved visitors for the institution. If a visitor's name is removed from the list, written notice is given to the inmate. In response, the inmate and the visitor may submit written opposition. *See* WAC 275-80-846(2), attached in Appendix I.

ARGUMENT

I. Prison Regulations That Do Not Affect the Duration of, or Release From, Confinement Should Not Create an Entitlement Protected By the Due Process Clause Regardless of the Mandatory Character of the Language Used or the Limits Placed on Official Discretion.

A. *Hewitt v. Helms* and *Kentucky Department of Corrections v. Thompson*.

This Court recognized in *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), that a liberty interest may arise from either of two sources: the Due Process Clause or state law. Under the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV Sec. 1. A state creates a protected liberty interest by placing limitations on official discretion. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). In *Kentucky Dept. of Corrections*, this Court described the process whereby substantive limits may be placed on official discretion as follows:

> A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing "substantive predicates" to govern official decision

> making, *Hewitt v. Helms*, 459 U.S. at 472, 103 S.Ct. at 871, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Kentucky Dept. of Corrections, 490 U.S. at 462.

In *Kentucky Dept. of Corrections*, this Court declined to set forth a new bright line rule that would exclude certain prison regulations from judicial scrutiny under the test established in *Hewitt*. In footnote 3, this Court stated as follows:

> Petitioners and their *amici* urge us to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, "do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement." *See* Brief for Petitioners 10. They argue that this bright line would allow prison officials to issue guidelines to prison staff to govern minor decisions, without thereby transforming the details of prison life into "liberty interests" with accompanying procedural rights. Inasmuch as a "bright line" of this kind is not necessary for a ruling in favor of petitioners, we refrain from considering it at this time. We express no view on the proposal and leave its resolution for another day.

Kentucky Dept. of Corrections, 490 U.S. at 461-62, n. 3.

This Court should re-examine the issue posed by footnote 3 of the Court's decision in *Kentucky Dept. of Corrections* and adopt the rule suggested in that case. This Court should adopt the rule originally suggested in the *Kentucky* case because interpretation of *Hewitt* has caused undue interference with prison management and has made federal courts the super wardens of institutions in a manner inconsistent with that contemplated in precedent.

B. This Court did not intend for the rule set forth in *Hewitt v. Helms* to interfere in matters concerning daily prison management.

The test set forth in *Hewitt* could apply to any type of prison regulation. However, this Court in *Hewitt* did not intend to interfere in matters concerning daily prison management. In *Hewitt*, this Court reviewed statutes and regulations governing the Pennsylvania prison system in order to determine whether the rules governing the administrative segregation of inmates grant the inmates a liberty interest protected under state law and therefore protected under the Due Process Clause. This Court held that administrative segregation, "the transfer of an inmate to a less amenable and more restrictive quarters for nonpunitive reasons, is well within the terms of confinement already contemplated by a prison sentence." *Hewitt,* 459 U.S. at 468. This Court based this holding upon this Court's decision that:

> [a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.

Montanye v. Haymes, 427 U.S. 236, 242 (1976). *See also Vitek v. Jones*, 455 U.S. 480, 493 (1980).

However, this Court recognized in *Hewitt* that state regulations or statutes may create state created liberty interests which would entitle inmates to additional due process protections above and beyond the Due Process Clause, provided these regulations made "repeated use of explicitly mandatory language in connection with requiring specific substantive predicates." *Hewitt*, 459 U.S. at 472. This Court reasoned that the mere use of "shalls" and "wills" was not enough. Instead, the regulation must connect the mandatory language with the substantive predicate in order to demand "a conclusion that the state has created a protected liberty interest." *Id.*

The Court in *Hewitt* pronounced the above criteria with caution. The Court noted that the use of "shalls" and "wills" was not enough to conclude from procedural guidelines that a liberty interest had been created for the following reasons:

> The creation of procedural guidelines to channel the decisionmaking of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold that when a state embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the states choose to require.

Id. at 471.

Consistent with the above reasoning, this Court has recognized the deference paid by the courts to prison officials concerning the performance of their daily responsibilities. "[W]e have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves." *Id.* at 469. The safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials. *See Meachum v. Fano*, 427 U.S. 215, 225 (1976). Consistent with this premise, numerous cases have respected the institution's right to manage. For example, the Constitution does not create a property or liberty interest in prison employment. *Ingram v. Papalia*, 804 F.2d 595, 596 (10th Cir. 1986); *Adams v. James*, 784 F.2d 1077, 1079 (11th Cir. 1986); *Altizer v. Paderick*, 569 F.2d 812 (4th Cir. 1978). In *Altizer*, the court reasoned as follows:

> It is well settled that federal courts do not occupy "the role of super wardens of state penal institutions" and "do not sit to supervise state prisons." In particular, the classifications and work assignments of prisoners in such institutions are matters of prison administration, within the discretion of prison administrators, and do not require fact-finding hearings as a prerequisite for the exercise of such discretion. To hold that they are "within reach of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."

Id. at 812-13 (citation omitted).

The Constitution does not secure an inmate the right to be confined in any particular facility. *Meachum*, 427 U.S. at 224. The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence." *Kentucky Dept. of Corrections*, 490 U.S. at 461 (*quoting Hewitt*, 459 U.S. at 468); *see also Olim v. Wakinekona*, 461 U.S. 238, 249-50 (1983) (the Due Process Clause does not restrict interstate transfers); *Montanye*, 427 U.S. at 243 (the Due Process Clause does not restrict intrastate transfers).

Any of these aspects of daily prison management may be scrutinized under the Due Process Clause where a state, through specific language, creates a liberty interest. The rule in *Hewitt* causes uncertainty because it may be applied to any regulation, thereby raising the issue of a liberty interest. This is despite the fact that it is the stated intention of the federal courts to avoid the management of prisons.

Given this premise, the question becomes whether the test used in *Hewitt* accomplishes what the test originally set out to do. That is, can states practically and effectively use the *Hewitt* formula and thereby avoid additional liability under the Due Process Clause? Under the *Hewitt* rule, states fall victim to uncertainty because there is no "bright line" rule that provides guidance to the policy maker as to whether a regulation, policy, or directive clearly establishes a state created liberty interest for an inmate.[3] Because the *Hewitt* rule cannot be clearly interpreted by a state correctional agency, it should be set aside or clarified in favor of a test with greater predictability and fewer claims of qualified immunity.

C. Despite This Court's Intentions To Avoid Interference With Prison Management, The Circuit Courts of Appeals Have Engaged In A Confused And Varied Application Of The *Hewitt* Rule, Causing The Interference This Court Sought To Avoid.

In this case, the Ninth Circuit Court of Appeals found that a liberty interest existed under both the regulations governing visiting privileges and the regulations governing dry cell watches. *Mendoza*, 960 F.2d at 1429, 1431-32.

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[3] Once a state-created liberty interest is found the question as to which process is due raises additional complications that states must face when the Due Process Clause applies to regulations governing prison management. In *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), this Court held once the Due Process Clause applies through a state-created liberty interest, the Constitution, not State law, governs whether there are adequate procedural safeguards to protect that interest. This is the result even though the regulation or law prescribe the due process which accompanies the liberty interest. *Id.* at 541.

Here, Petitioners do not seek reversal of *Loudermill.* However, the holding in *Loudermill* further demonstrates the levels of uncertainty faced by prison managers when the Due Process Clause is applied to regulations governing prison management. When the Due Process Clause is applied to a prison regulation, constitutional principles control instead of the procedures set forth in the regulation. The rule in *Loudermill* thus would further discourage the drafting of policies and procedures that govern institutions. In addition to the uncertainty posed by the application of the *Hewitt* test, correctional agencies are less certain about what process is due under the United States Constitution. In order to limit their liability under the Due Process Clause, correctional agencies would seek to avoid the application of *Hewitt* and *Loudermill* altogether by not writing policies or regulations, otherwise needed for the proper management of a correctional facility.

Here, the Court found a liberty interest in the dry cell watch procedure even though the dry cell watch was based upon a corrections officer's reasonable suspicion and even though the dry cell watch was only one of a number of possible options available to restrict possession of contraband once the reasonable suspicion has been established.[4] *Id.* The court also found that the visitation policies granted a liberty interest to visit with a specific person even though the policy provided that visits "may be denied or terminated and visiting privileges suspended under" an enumerated set of circumstances. In addition, Washington Administrative Code

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[4] In this case, the Court of Appeals discussed the nature of the mandatory requirements and concluded that it was irrelevant whether a dry cell watch must result from a reasonable suspicion and stated as follows:

> The defendants mistakenly focus upon the question whether the superintendent has discretion not to place a prisoner on dry cell watch even though he may have reasonable suspicion that the prisoner has secreted contraband. The relevant question is whether the superintendent has discretion to fail to follow dry cell watch procedures once he determines to place a prisoner on watch. The substantive predicates and explicitly mandatory language indicate he has no such discretion. The regulation creates a protected liberty interest.

Mendoza, 960 F.2d at 1429 (emphasis in original).

Here, however, the policy does not limit the superintendent's discretion to utilize a different procedure or no procedure. For example, if it is suspected that the contraband has been inserted rather than ingested, medical personnel may order a rectal examination, an X-ray, or another medical procedure, where it is medically necessary. In addition, the superintendent could opt to do nothing or perhaps monitor the inmate to identify a possible drug smuggling ring.

In its decision, the Ninth Circuit improperly found this analysis to be irrelevant. *Mendoza*, 960 F.2d at 1429. Instead, the court focused on the policies governing the procedurel due process aspects of the dry cell watch, once the watch was implemented. *Id.* However, the court does not identify which policies grant a liberty interest and why. The court should have looked for relevant mandatory language directing a substantive outcome. The court only indicated generally that the WSP dry cell watch policies granted a liberty interest through its procedural requirements and then proceeded to determine what constitutional process was due in light of the liberty interest created by the state.

275-80-900 and WSP policy provides that the superintendent may remove an individual's name from an approved visiting list. *See* Washington Administrative Code 275-80-846(2); and IO 16.020 (VI)C, Appendix at F-6, 7; and Appendix I; *Mendoza,* 960 F.2d at 1432-33 (emphasis added). The court reached the result in this case even though the Ninth Circuit Court has stated that these policies "must eliminate all discretion" in order to create a state created liberty interest. *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) (emphasis added); *see also Bauman v Arizona Dept. of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985). Here, the Ninth Circuit Court did not look for language that eliminated all discretion. Instead, the court cited *Kentucky* and looked for language that only limited some discretion. *Mendoza*, 960 F.2d at 1428.

The Ninth Circuit has found state created liberty interests in other situations. *See McKinney v. Anderson*, 924 F.2d 1500 (1991), *cert. granted and vacated in Helling v. McKinney*, ___ U.S. ___, 112 S.Ct. 291, *reinstated, McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 1992), *cert. granted*, ___ U.S. ___, 112 S.Ct. 3024 (1992) (Nevada anti-smoking statute applies to state prison law libraries and creates a liberty interest in a smoke-free law library protected by the Due Process Clause).

Courts in other circuits have applied a different test in determining whether a liberty interest has been created by a state policy. The Seventh Circuit Court of Appeals addressed this question in *Smith v. Shettle*, 946 F.2d 1250 (7th Cir. 1991). In *Smith*, the court held that administrative segregation policies of the Indiana State Prison did not grant inmates liberty interests in their classification and level of custody. The court in *Smith* discussed the *Hewitt* test as follows:

> No magic form of words is required to make a regulation mandatory; all that is required is that it be clear that if X (the substantive predicate), then Y (the specified outcome, from which the enforcement officials are not free to depart).

Smith, 946 F.2d at 1253 (citation omitted).

In *Smith*, the Seventh Circuit Court pointed out that procedural regulations governing the review procedures for administrative segregation did not create liberty interests and reasoned as follows:

> We add that the mere fact that Indiana law requires review every thirty days does not establish this frequency as a constitutional minimum (or maximum). Procedural regulations are not a source of constitutional entitlements, and violations of a state law that does not create such an entitlement are not actionable under the due process clause.

Id. at 1254 (citations omitted) (In *Mendoza*, the Ninth Circuit Court found liberty interests in the procedural regulations for both visitation and the dry cell watch. *Mendoza*, 960 F.2d at 1425).

Under a decidedly different approach, the Sixth Circuit Court of Appeals has found that a requirement that corrections officers "make every reasonable effort to provide separate housing" for inmates with different psychological needs granted inmates a protectable liberty interest in an inmate's classification "with regard to his safety and mental disabilities." *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 558 (6th Cir. 1992). In this case, it was sufficient that substantive predicates limit, rather than eliminate discretion in order to create a liberty interest. *Id.*

Other courts have looked beyond the test in *Hewitt* and have held that use of boilerplate language in prison policies prevented the creation of state-created liberty interests. *See Jones / Seymour v. LeFebvre*, 781 F. Supp. 355, 359 (E.D. Pa. 1991); *Williams v. Kyler*, 680 F. Supp. 172 (M.D. Pa. 1986), *aff'd*, 845 F.2d 1018 (3rd Cir. 1988) (Disclaimers defeat the existence of a liberty interest even though the test under *Hewitt* has otherwise been satisfied).

The Ninth Circuit, on the other hand, has used the absence of boilerplate language to distinguish this case from *Kentucky Dept. of Corrections* and to find that a liberty interest existed. The Court noted that, unlike the visiting regulations in *Kentucky*, the WSP policies "do not provide that the administrative staff 'reserves the right' to allow or disallow visits." *Mendoza*, 960 F.2d at 1433 (*quoting Kentucky Dept. of Corrections*, 490 U.S. at 464).

Overall, a state of confusion and disagreement exists among the circuit courts in terms of what does and does not constitute a liberty interest. As a result, correctional managers have been provided little meaningful direction as to how they may govern and direct correctional staff without granting additional and unwanted rights to inmates under the Due Process Clause.

II. This Court Should Clarify The Rule In *Hewitt* And Hold That Prison Regulations Which Do Not Affect The Duration Of, Or Release From, Confinement Should Not Create An Entitlement Under The Due Process Clause.

Since this Court's holding in *Hewitt*, this Court has recognized that prison officials should not be punished for implementation of policies which effectively govern institutions. However, the advent of the state-created liberty interest has generated confusion that has defeated that policy. Confusion exists as to whether policies must limit or eliminate discretion. Confusion exists as to whether mandatory language ("shall" or "will") must be found in regulations. There is further confusion as to the degree of predictability which must be set forth by a statute, regulation or policy, in order for a liberty interest to be created. The courts are confused as to the difference between procedural and substantive predicates for action. Finally, confusion exists as to whether the state may avoid the Due Process Clause entirely by using disclaimer or boilerplate language.

The confusion generated by the *Hewitt* rule is most evident, however, in the Ninth Circuit's opinion in this matter. In this case, the Court confuses mandatory language with language that permits discretion. The Court finds substantive predicates for action in rules governing procedure. The Ninth Circuit Court did not think it to be relevant that the superintendent had the discretion to order the dry cell watch, follow other options or do nothing. The Court confused the regulations governing visitation privileges as a whole with rules governing visits with specific individuals. Finally, the Court distinguished this case from *Kentucky* in part because the visitation procedures did not use disclaimer language which reserved the right to suspend visits with particular individuals.[5] Given the confusion that exists in this area, prison officials do not know which action upon which policy might give rise to the next federal civil rights lawsuit.

To the contrary, liberty interests under the Due Process Clause are governed by a bright line rule. In *Hewitt*, this Court clearly pronounced administrative segregation as the type of prison condition that is to be expected as part of punishment under a judgment and sentence. This Court, however, reached a different conclusion in *Vitek*, regarding prison inmates placed in state mental hospitals. *Vitek*, 445 U.S. at 493-94 (subjecting an inmate to involuntary psychiatric treatment in a state mental hospital is not within the sentencing imposed upon an inmate and requires additional due process protections).

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[5] In *Kentucky Dept. of Corrections*, this Court differentiated between visitation privileges as a whole and in inmate's right to visit with any specific individual. This Court reasoned as follows:

> Respondents do not argue—nor can it seriously be contended, in light of our prior cases—that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause . . . However, "[a]s long as the conditions or degree of confinement to which a prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison officials to judicial oversight." The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," and therefore is not indepdently protected by the Due Process Clause.

Kentucky Dept. of Corrections, 490 U.S. at 460-61 (citations omitted) (emphasis added).

Hewitt and *Vitek* are cases that fall on either side of a bright line rule of constitutional due process analysis. Prison officials deserve the same consideration from the federal courts in terms of a bright line rule that excludes state-created liberty interests from analysis under the Due Process Clause unless the interest deals with personal liberty.

In this case, implementation of a dry cell watch and restriction of visitation with specific individuals would be excluded from consideration under the Due Process Clause because they constitute conditions that should be expected during incarceration under a judgment and sentence.[6]

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[6] There is no constitutional due process interest in avoiding a dry cell watch. This Court discussed the realities of the need for prison security as follows:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented . . .

Bell v. Wolfish, 441 U.S. 520, 559 (1979).

Under this premise, the court in *Bell* balanced the need to search contraband against an inmate's right and held that a strip search and visual body cavity inspection conducted routinely after every contact visit was appropriate under the Fourth Amendment. *Id.*, 441 U.S. at 560. Under the Due Process Clause this Court has consistently found no independently protected due process liberty interest in such things as administrative segregation, classification, level of custody, location, and other details normally associated with prison management. Changes, inconveniences, displeasure, and deprivations associated with transfer, unemployment, administrative segregation and other actions are the type of unpleasantries that inmates should reasonably anticipate receiving at some point in their incarceration.

Consistent with the above cases and reasoning, an inmate should reasonably anticipate being subject to cell searches, body searches, cavity and excrement searches during the term of the inmate's confinement. Such procedures are not limitless because these searches are subject to scrutiny under other constitutional limitations, such as the Eighth Amendment and to a limited extent, the Fourth Amendment.

This Court should therefore exclude from consideration under the Due Process Clause prison regulations, policies and directives that do not affect the duration of, or release from confinement, such as administrative segregation, dry cell watch, restrictions of visits to particular visitors, inmate placement, employment, and other management issues. Unless the state has clearly stated an intent to create a "liberty interest under the Due Process Clause" in policies governing prison management, these regulations should not be subject to review under the Fifth and Fourteenth Amendments. The determination of liberty interests under the Due Process Clause should thus be simplified such that as long as the prison condition is within the sentence imposed upon the inmate, the courts should not review the condition under the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request this Court to revise the rule set forth in *Hewitt v. Helms*, such that it would be restricted to matters concerning duration of confinement, release from, or the very nature of confinement. It is important for this Court to review this decision in order to provide proper guidance to prison officials in light of the Due Process Clause and to exclude policies not having to do with duration of, or release from, confinement from consideration under the Fifth or Fourteenth Amendments.

THEREFORE, Petitioners request that Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED this ____ day of August, 1992.

KENNETH O. EIKENBERRY
Attorney General

KATHLEEN D. MIX
Sr. Assistant Attorney General
Counsel of Record

JOHN SCOTT BLONIEN
Assistant Attorney General

DANIEL J. JUDGE
Assistant Attorney General

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-89-770-JBH

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT *INTER ALIA*

ROGACIANO MENDOZA,

Plaintiff,

v.

JAMES BLODGETT, et al.,

Defendants.

BEFORE THE COURT are the parties' cross-motions for summary judgment (Ct. Rec. 22 and 28), the plaintiffs motion for appointment of counsel (Ct. Rec. 30), the plaintiffs motion for appointment of an interpreter (Ct. Rec. 31), the plaintiffs motion to strike and dismiss the defendants' response to plaintiffs motion for summary judgment (Ct. Rec. 37), and plaintiffs motion for objections to the defendants' response to plaintiffs motion for appointment of counsel and interpreter (Ct. Rec. 40).

This is a 42 U.S.C. § 1983 action. To state a claim under section 1983 a person must allege the violation of a right secured by the constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

Plaintiff, an inmate at the Washington State Penitentiary (WSP), contends that his constitutional rights were violated because of his temporary placement in a "dry cell." Plaintiff alleges violations of his rights under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth amendments to the United States Constitution. He also alleges pendent state law claims based on outrage, invasion of privacy, and violations of the Washington state constitution.

SUMMARY JUDGMENT MOTION

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). On a motion for summary judgment, this court must determine if a fair-minded jury could return a verdict for a nonmoving party. *Id.* at 252. The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has carried its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Id.* at 585-586. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. *Id.* If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*, 474 U.S. at 587. However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Id.*

a. Uncontroverted Facts

On March 29, 1989, plaintiff was visited by his wife and six children in the contact visiting room at WSP. At about 6:45 p.m., the Mendoza children came to the front of the visiting room and requested that they be allowed to use the restroom. The restroom is located through a locked door in the hall outside the visiting room. Correctional Officer

(CO) Edith Jones alleges that as she was preparing to escort the children to the restroom, she noticed a balloon on the floor. According to CO Jones, the balloon was covered with a white, slimy substance and the tip had been bitten off.

CO Jones informed the shift lieutenant of her observations. The shift lieutenant relayed the information to John Lambert, the associate superintendent. Mr. Lambert ordered Mendoza to be removed from the visiting room and placed on a dry cell watch.

Mendoza was placed on dry cell watch at 8:40 p.m. on September 29, 1989. Prior to being placed in the dry cell, both the cell and Mendoza were searched. Mendoza was placed into the cell wearing a t-shirt and a clean pair of shorts. Mendoza was searched every four hours during his stay in the dry cell. He was provided with breakfast, lunch and dinner on September 30, 1989. During his time in the dry cell, Mendoza defecated five times. No contraband was found in his feces. Mendoza was released from dry cell watch at 8:41 p.m. on September 30, 1989.

Mendoza received an infraction. Defendant Blodgett, WSP Superintendent, determined that a balloon had been found in the visiting room area where the Mendoza children had been present. However, Superintendent Blodgett also determined that there was no evidence of Mendoza's direct involvement in the balloon incident. As a result, the infraction was dismissed. Nevertheless, Mendoza's visits with his wife were suspended for ninety days. At the present time, those visits have been restored.

b. Plaintiff's Claims

Mendoza contends that he was subject to cruel and unusual punishment by being placed in the dry cell. According to Mendoza, the punishment is cruel and unusual because: 1) the inmate is placed into the cell with a minimal amount of clothing and without a blanket, regardless of the temperature within the cell; 2) the inmate is under constant surveillance while sleeping, urinating and defecating; 3) the inmate's sleep is disturbed in order to conduct periodic searches and in order to exercise the inmate; 4) the inmate is not allowed to possess any items of personal property while in the dry cell; 5) dry cell inmates are not allowed to wash after urinating or defecating and are not allowed to shower at anytime; 6) dry cell inmates are strip searched every four hours; 7) there is no constitutionally acceptable justification for the use of the dry cell. (Ct. Rec. 5).

These same allegations appear to be the foundation for Mendoza's claims of privacy violations and unreasonable search and seizure.

Mendoza also alleges that his rights to procedural due process were violated by the dry cell watch policy. According to Mendoza: 1) he was placed in the dry cell without reasonable cause; 2) he was not told why he was placed in the dry cell; 3) defendant Blodgett failed to investigate the incident; 4) Blodgett assessed the loss of visitation sanction without holding a hearing on the matter and despite the fact that he was not a "neutral" fact-finder; 5) the sanction was assessed without the plaintiff receiving written reasons and an opportunity to appeal. (Ct. Rec. 5).

c. Discussion

1. Constitutional Validity of Dry Cell Policy

The logical starting point in the court's analysis is the constitutionality of the WSP dry cell policy.[1] (Ex. A and B to Ct. Rec. 23). In *Turner v. Safley*, 482 U.S. 78, 89-91 (1987), the United States Supreme Court set out four factors for determining the validity of a prison regulation which impinges on an inmate's asserted constitutional rights. The first factor is whether the objective underlying the regulation is legitimate, neutral and rationally related to the regulation. The second factor is whether there are alternative means of exercising the right which remain open to inmates. The third factor is the impact that accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources in general. The fourth factor is whether there are any obvious and easy alternatives to the regulation. The alternative must fully accommodate prisoner rights at a *de minimis* cost to valid penological interests.

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[1] Mendoza was placed in the dry cell pursuant to institutional order (I.O.) 09.053. That policy was approved in October 1988 and remained in effect until March 7, 1990 when it was superseded by a new policy (WSP Field Instruction 420.311).

At issue in this case is I.O. 09.053. Any farther references to WSP dry cell policy are to I.O. 09.053. The terms "dry cell watch" and "feces watch" may be used interchangeably throughout this opinion.

This court finds that WSP's dry cell policy is facially valid under the *Turner* analysis. The detection and elimination of contraband, especially illicit drugs, is clearly a legitimate objective designed to insure prison security. Mendoza does not contest this point. Furthermore, the policy is neutral and rationally related to the legitimate objective. A common method of concealing contraband is by ingestion. The contraband is retrieved after it has been passed through a bowel movement. By examining an inmate's bowel movement, prison officials can determine whether the inmate is attempting to smuggle contraband into the institution. Only those reasonably suspected of being in possession of contraband are subject to a dry cell watch. In addition, only the superintendent or his designee with the rank of captain or above can approve placing an inmate in the dry cell.

With respect to the second *Turner* factor, if the dry cell watch is conducted in a reasonable and non-abusive fashion, there is no need for the existence of alternative means to exercising the asserted constitutional right. This is because a properly conducted dry cell watch does not amount to cruel and unusual punishment, nor a privacy violation, nor an unreasonable search and seizure (see discussion *infra*).

Considering the third factor, it is obvious that the unchecked flow of contraband into the institution poses a threat to staff and to the other inmates. Mendoza cannot seriously contest this fact.

With respect to the fourth factor, Mendoza notes several alternatives to the dry cell watch. These alternatives include x-rays, mental detectors, laxatives and enemas. Defendants cite *Bell v. Wolfish*, 441 U.S. 520, 559 at n.5, in which the Court found that use of a metal detector would not be as effective as a visual cavity inspection because money, drugs, and other non-metallic contraband could escape detection.

Although defendants fail to address the other suggested alternatives, the Supreme Court emphasized in *Turner* that the test is not a least restrictive alternative test. Prison officials do not have to set up and then shoot down every conceivable method of accommodating the constitutional complaint. The burden is on the plaintiff to come up with an alternative that fully accommodates his rights at minimal costs to valid penological interests. 482 U.S. at 90-91. Mendoza has merely suggested these alternatives. The mere existence of alternatives does not make a prison regulation unreasonable. Mendoza has failed to meet his burden.

2. Cruel and Unusual Punishment

The facial validity of the regulation is irrelevant if it is applied unconstitutionally. Mendoza claims that as applied to him, the dry cell watch policy constituted cruel and unusual punishment. The Eighth Amendment involves consideration of three factors: 1) the wanton and unnecessary infliction of pain; 2) punishment which is disproportionate to the severity of the crime; and 3) conditions which, alone or in combination, deprive an inmate of the minimal civilized measure of life's necessities. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

"[C]onduct that does not purport to be punishment must involve more than ordinary due care . . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . . . " *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1401 (1986). (citations omitted). A prison condition constitutes "unnecessary and wanton infliction of pain" when the condition violates "evolving standards of decency, "or is so totally without penological justification that it results in the gratuitous infliction of suffering." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (citations omitted).

In the Ninth Circuit, each unrelated condition that allegedly contributed to the violation of Eighth Amendment rights is considered separately, that is, "a number of *unrelated* conditions, each of which satisfy eighth amendment requirements, cannot in combination amount to an eighth amendment violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986) (emphasis original), *cert. denied*, 481 U.S. 1069 (1987). However, related conditions may be combined in determining whether there is a violation of the Eighth Amendment. "[R]elated conditions are those conditions that combine to deprive a prisoner of a discrete basic human need, [e.g.], food, clothing, shelter, sanitation, medical care and personal safety." *Id*. at 1107.

In determining whether any condition or combination of related conditions violates the Eighth Amendment, the court "may consider the length of time that the prisoner must go without these benefits." *Hoptowit*, 682 F.2d at 1258. The court may also consider the existence of emergency situations. "[W]hen a genuine emergency exists, prison officials may be more restrictive than they otherwise may be, and certain services may be suspended temporarily. The more basic the particular need, the shorter the time it can be withheld. . . . In determining the existence of such needs, we must give reasonable leeway to prison officials." *Hoptowit*, 682 F.2d at 1259. "'Prison administrators . . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Alberts v. Whitley*, 475 U.S. at 321-322 (citing to *Bell v. Wolfish*, 441 U.S. 520, 547).

Pursuant to WSP policy, Mendoza was placed in the dry cell wearing only a pair of shorts (Exhibit A to Ct. Rec. 23). The log reflects that he was given a clean pair of shorts to wear in the dry cell (Attachment 11, Exhibit C to Ct. Rec. 23). The rest of the inmate's clothing is placed in a plastic bag and retained by prison hospital staff for the duration of the inmate's stay in the dry cell. WSP policy required that cell temperature be at least 68 degrees fahrenheit. Prison staff could allow the inmate to receive an insulated top if circumstances warranted it. The log reflects that the temperature was 78 degrees when Mendoza was placed in the dry cell. Several readings thereafter indicated temperatures between 80 and 82 degrees.

Obviously, the purpose of minimally clothing the dry cell inmate is to insure that he is unable to conceal or destroy any contraband passed through a bowel movement. If the inmate were allowed a blanket or any additional clothing, it would make it easier for him to do that. Taking away the inmate's clothes to aid in the detection of contraband is not a punitive action. The log does not show that Mendoza complained that the cell was cold. The log does not show that Mendoza requested a blanket, an insulated top or any additional clothing during his stay in the dry cell. There is no evidence that Mendoza became ill because the dry cell was too cold or because he did not have enough clothing. In fact, Mendoza's primary concern appears to be the indignity of being placed half-naked into the dry cell. By itself, this is not cruel and unusual.

WSP policy requires that the feces watch officer not take his eyes off the inmate at anytime. It also requires that the inmate's hands be kept in plain sight at all times. The purpose of the dry cell watch mandates that there be continuous surveillance of the inmate. Continuous surveillance prevents the inmate from concealing or destroying contraband. It surely is unpleasant having someone watch you urinate and defecate, but considering the penological justification for the feces watch, it cannot be considered cruel and unusual.

WSP policy requires that the inmate be strip searched and exercised for fifteen minutes every four hours. In addition, the cell is to be searched once every eight hours. Mendoza says that this disrupts his sleep and this court does not doubt it. However, here again, these policy requirements further the legitimate objective of the dry cell watch. Periodic exercise, strip searches and cell searches insure that contraband is not being concealed or destroyed.

WSP policy prohibits inmates from possessing any personal property items in the dry cell. This makes sense since it is possible that personal property items could be used to conceal or destroy contraband. In addition, the temporary nature of the stay in the dry cell makes it pointless to allow the inmate to accumulate such items. The prohibition on personal property items is neither cruel or unusual.

WSP policy provides that the dry cell inmates have access to certain hygiene articles at breakfast, lunch, dinner, and after any bowel movement. The hygiene articles include a wash cloth, a face towel, a bar of soap, toothbrush and toothpowder, and a wash basin. It is true that the inmate is not allowed to wash immediately after urinating or defecating. By making hygiene articles available only at specified items, this reduces the inmate's opportunities to destroy contraband before prison staff have had a chance to do their inspection. The risk of contamination cannot be too great since the inmates are allowed to clean themselves when it is most important. Furthermore, the prohibition on showers lessens the chance that a dry cell inmate will be able to "wash away" contraband. Dry cell inmates are provided with sufficient hygiene compatible with the purpose of the dry cell policy.

Finally, Mendoza claims that his placement in the dry cell was not based upon reasonable suspicion that he had ingested contraband. According to Mendoza, this alleged lack of reasonable suspicion made it cruel and unusual to place him in the dry cell. WSP policy, at the time Mendoza was placed in the dry cell, required that there be:

> . . . individualized suspicion which is based on specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. (Exhibit A to Ct. Rec. 23).

According to the affidavit of CO Edith Jones (Exhibit E to Ct. Rec. 23), at approximately 7 p.m. on September 29, 1990, the Mendoza children came to the front of the visiting room and asked CO Jones that they be allowed to use the visitors' restroom. At this time, CO Jones was in the control room adjacent to the visiting area. CO Jones states that after the children had gone to the restroom, she found a yellow balloon on the floor where the children had been standing. The balloon was covered with white slime and its tip had been bitten off. CO Jones said she picked up the balloon and placed it in an evidence bag. After that, she contacted the shift lieutenant's office to inform him of her discovery.

CO Larry Brown was working as a control booth officer on September 29. He was in charge of controlling the door to and from the visiting room to the visitor's restroom. Brown says the Mendoza children were the only persons he observed in the area where the balloon was found. Brown says that the Mendoza children were the first to request the use of the visitor's restroom during that particular visiting session. (Exhibit F to Ct. Rec. 23).

Defendants have proffered Mendoza's infraction history in support of their finding of reasonable suspicion. Mendoza was infracted on August 19, 1985, June 10, 1986 and August 10, 1989 for possession of narcotics. (Attachment 1, Exhibit C to Ct. Rec. 23). Associate Superintendent John Lambert says that he considered the accounts of CO Jones and Brown in conjunction with Mendoza's institutional history. Based on that information, Lambert ordered Mendoza to be placed on dry cell watch. (Exhibit G to Ct. Rec. 23).

In his amended complaint, Mendoza says his children know nothing about a yellow balloon. Mendoza seems to contend that the balloon never existed or that it was planted by prison staff. Mendoza points out that the defendants did not determine the contents of the balloon. He also notes that no contraband was found during the dry cell watch and that his infraction for this incident was ultimately dismissed.

Reasonable suspicion does not require absolute certainty. The existence of reasonable suspicion does not require that the suspicion ultimately turn out to be true. The fact that no contraband was found on Mendoza does not mean that prison staff were without reasonable suspicion that Mendoza might have ingested contraband.

Reasonable suspicion is something less than probable cause. The defendants did not have to determine that it was more probable than not that plaintiff had ingested contraband. Under a probable cause standard, one can speculate that additional evidence may have been necessary before Mendoza could have been placed in the dry cell. Perhaps it would have been necessary to do scientific testing to determine whether the balloon had been filled with contraband. Perhaps it would have been necessary to interrogate Mendoza's wife and children.

Reasonable suspicion is sufficient in a prison setting. In *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1978), the Supreme Court found that visual body cavity inspections could be conducted on less than probable cause. Of course, searches must be reasonable and cannot be conducted in an abusive fashion. Reasonableness requires a balancing of the need for the particular search against the invasion of personal rights entailed by the search. A court must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Two things are significant about *Bell*. First, the Court upheld a blanket visual body cavity inspection policy. All the inmates were subject to such an inspection following a contact visit with someone from outside the institution. 441 U.S. at 558. Secondly, the Court upheld the application of the blanket policy to pre-trial detainees, individuals awaiting trial but not yet convicted.

In the instant case, the dry cell policy was not a blanket policy. Furthermore, the policy was allied to convicted felons, not to pre-trial detainees. Surely, if the Supreme Court has found that legitimate security concerns justify a blanket visual cavity inspection against pre-trial detainees, a dry cell policy based on reasonable suspicion must be constitutional.

The instant case should also be compared to the digital rectal probe policy at issue in *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 2087 (1989) and *Wetmore v. Gardner*, 735 F. Supp. 974 (E.D. Wa. 1990). Until recently, all inmates transferred to the Intensive Management Unit (IMU) at WSP were rectally probed. In *Wetmore*, the court noted that the blanket policy was unconstitutional for two reasons: 1) inmates were probed without any cause predicate, and 2) the state failed to show that the probes were related to security considerations at the institution.[2] In contrast, the dry cell policy satisfies both of these elements. A dry cell watch requires a cause predicate in the form of reasonable suspicion. And, as already noted, the dry cell watch is rationally related to maintaining security at WSP.

Based on the available evidence, defendant had reasonable suspicion to justify at least the initial placement of Mendoza in the dry cell. Mendoza's argument that there was no balloon or that the balloon was planted by prison staff is unsupported speculation. Mendoza has offered no affidavits or other documentary evidence in support of this argument. Mendoza has offered nothing to show that prison staff set him up. The ingestion of balloons filled with contraband is a well-known smuggling technique. Mendoza's children were the only individuals present at the time and place where the balloon was discovered. Finally, Mendoza's history of drug-related infractions speaks for itself. The court will not substitute its judgment for the judgment of prison officials in circumstances such as these.

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[2] Currently, probes are conducted at WSP, but only upon a reasonable suspicion that an inmate has secreted contraband in his rectum. 860 F.2d at 325, n.7.

3. Illegal Search and Seizure; Privacy

Mendoza claims that being placed in the dry cell was an unreasonable search and seizure and violated his right of privacy. The reasoning used in denying plaintiff's Eighth Amendment claim is equally relevant to plaintiff's Fourth Amendment and privacy claims. As such, these claims must also fail.

In *Bell v. Wolfish*, (cited supra), the Supreme Court found no Fourth Amendment violation in a blanket policy of visual body cavity searches of pre-trial detainees. As noted, WSP's dry cell policy at least requires reasonable suspicion and pertains only to convicted felons, rather than pre-trial detainees. Under *Bell*, the dry cell watch is a *per se* reasonable search for Fourth Amendment purposes.

The feces watch policy is undoubtedly a very intrusive type of search. In the Ninth Circuit, incarcerated prisoners retain a limited right of bodily privacy.[3] According to *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988), "shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity." In *Michenfelder*, the court found that routine strip searches were not unconstitutional although female guards infrequently and casually observed inmates being searched. *See also Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985). The court found that the internal security needs and the equal employment concerns of the institution outweighed the inmates' limited privacy right.

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[3] The Supreme Court's venture into inmate privacy has been limited to cell privacy rather than bodily privacy. In *Hudson v. Palmer*, 468 U.S. 517 (1983), the Supreme Court found that a prisoner does not have a subjective expectation of privacy in his prison cell and as such, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. According to the Court, complete access to the cells by prison officials is necessary if drugs and contraband are to be kept out of the institution. 468 U.S. at 526-527.

Mendoza has offered no facts which would reasonably suggest that his limited privacy right is superior to WSP's interest in maintaining a drug-free institution. Because the feces watch policy is *per se* reasonable under *Turner v. Safley* and there is no evidence that the defendants did not follow the procedures prescribed by the policy, Mendoza's privacy rights have not been violated.

4. Procedural Due Process

Mendoza says that he was not afforded procedural due process. He says that he should have been provided with an opportunity to refute the suspicion that he was trying to smuggle drugs into the penitentiary.

Immediately after discovery of the balloon, Mendoza was escorted from the visiting area to the dry cell. There was no written notice or a hearing provided to Mendoza before he was placed in the dry cell on September 29 at 8:40 p.m. Mendoza was released from the dry cell on September 30 at 8:41 p.m. Mendoza was infracted for violations of the Washington Administrative Code (WAC). On October 2, 1989, Mendoza received notice of the infraction and of a disciplinary hearing to be held on October 4. At the hearing, plaintiff was found guilty. Mendoza appealed the decision to defendant Blodgett who then dismissed the infraction (Ct. Rec. 5 and 10).

The defendants argue that to the extent Mendoza may claim that his placement in the dry cell was an unauthorized act, he is limited to post-deprivation remedies under state law. *Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975 (1990). In the alternative, defendants claim due process was satisfied because of the existence of a cause predicate ("reasonable suspicion") for placing Mendoza in the dry cell.

First, it is not apparent that Mendoza is claiming that the defendants were unauthorized to place him in the dry cell. In fact, based on the existing facts, it appears Mendoza was placed in the dry cell in full compliance with WSP dry cell policy. A procedural due process violation can exist even where all actions have been in compliance with the relevant policy. Secondly, although this court agrees that there was a "reasonable suspicion" justifying Mendoza's initial placement in the dry cell, this alone does not preclude the possibility of a procedural due process violation.

This court believes that *Hewitt v. Helms*, 459 U.S. 460 (1983) is relevant for the analysis of Mendoza's procedural due process claim. Placement in a dry cell is a form of administrative segregation. According to *Hewitt*, "while no State may 'deprive any person of life, liberty, or property, without due process of law,' it is well settled that only a limited range of interests fall within this provision. Liberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the States." 459 U.S. at 466. Remaining in the general prison population is not a liberty interest independently protected by the Due Process Clause. *Id.* at 468-69.

Prison officials have broad administrative and discretionary authority over the institutions which they manage. If any substantial deprivation imposed by prison authorities triggered the protections of the Due Process Clause, it would subject to judicial review discretionary decisions which have traditionally been entrusted to prison administrators. Lawfully incarcerated individuals retain only a narrow range of protected liberty interests. Incarceration justifiably causes the retraction of many privileges and rights. 459 U.S. at 467.

The transfer of an inmate to less amenable and more restrictive quarters for *nonpunitive reasons* is within the terms of confinement contemplated by a prison sentence (emphasis added). Administrative segregation may be used to protect an inmate's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. 459 U.S. at 468.

If there is a cognizable liberty interest, the process due to an inmate who has been administratively segregated is as follows:

> . . . an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.

Id. at 476.

Mendoza does not have a liberty interest arising independently from the Due Process Clause. The placement of an inmate in the dry cell is an administrative measure designed to prevent the smuggling of contraband into the institution. The dry cell policy is not inherently punitive in nature. *See Bell*, 441 U.S. at 560-562. Certainly, it is possible that prison officials could abuse the policy and employ the dry cell as a punitive tool. However, in this case, prison officials did have a reasonable suspicion that Mendoza was trying to smuggle drugs. They were not acting in a punitive fashion and this court defers to their discretion.

The lack of a liberty interest arising from the Due Process Clause does not foreclose the possibility of a state-created liberty interest. However, the mere existence of state-created procedural guidelines does not give rise to a protected liberty interest. Rather, the procedural guidelines must use language of an unmistakably mandatory character ("shall," "will," "must") showing that they must be used. 459 U.S. at 471. Furthermore, the guideline must make it clear that certain actions will not take place in the absence of specified substantive predicates such as the "need for control" or "the threat of a serious disturbance." 459 U.S. at 472. The State does not create a constitutionally protected liberty interest if action can be taken for whatever reason or for no reason at all. There must be some substantive limitation upon the official's discretion. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1982).

WSP dry cell policy requires that there be reasonable suspicion that an inmate is internally carrying contraband. The policy requires that individualized suspicion be specifically directed at the person who is the subject of the search. Furthermore, the suspicion has to be documented. Approval for placing an inmate in the dry cell has to be obtained from the Superintendent or his designee, with the rank of Captain or above. The policy makes no provision for any type of notice or hearing prior to the inmate's placement in the dry cell. The policy makes no provision for a hearing or allowing the inmate to submit a written statement following placement in the dry cell (Exhibit A to Ct. Rec. 23).

It is clear that defendants complied with the requirements set forth in the dry cell policy. There was reasonable individualized suspicion that Mendoza had received drugs in the visiting area. Associate Superintendent John Lambert, the superintendent's designee, approved Mendoza's transfer to the dry cell. The suspicion was documented by an interdepartmental memorandum and infraction report prepared by CO Jones (Attachments 1 and 2, Exhibit E, Ct. Rec. 23) and the visitors' room log prepared by CO Larry Brown (Attachment 1, Exhibit F, Ct. Rec. 23). However, as already emphasized, compliance with the institution's internal policy may not be sufficient for due process purposes.

In Mendoza's case, there is a genuine issue of material fact whether the "reasonable suspicion" requirement is a substantive predicate to the placement of an inmate in the dry cell. This court is inclined to believe that "reasonable suspicion" is a substantive limitation on official discretion. It appears that defendants cannot place an individual in the dry cell for any reason or no reason at all.

Furthermore, there is a genuine issue of material fact whether the dry cell policy contains relevant mandatory language. The policy states that an inmate *will* be placed upon feces watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband. If there is reasonable suspicion, the Superintendent or his designee must place the inmate in the dry cell. There appears to be no choice in the matter.[4] As such, *Hewitt* may require that additional procedures be employed once the inmate has been placed in the dry cell. These procedures would include written notice of the reason for placement in the dry cell and an opportunity for the inmate to submit a written statement.[5]

There are two practical matters which need to be addressed. First, before an inmate is placed in a dry cell, prison officials conduct an informal non-adversarial evidentiary review to determine of there is reasonable suspicion. This is all that can reasonably be expected. Requiring any type of notice or hearing prior to placing an inmate in the dry cell would frustrate the entire purpose of the policy. Once prison officials have reasonable suspicion that an inmate has ingested contraband, the only reasonable chance they have of detecting that contraband is by immediately placing the inmate in the dry cell.

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[4] See *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 109 S.Ct. 1904 (1989). The question appears to be whether defendants have reserved the right to place or not to place an inmate in the dry cell regardless of the circumstances.

[5] A question which may arise is whether the Washington Administrative Code (WAC) provisions covering administrative segregation are relevant to the dry cell policy. WAC 137-32-001 et seq. There is unpublished authority in the Ninth Circuit that those provisions contain language of a mandatory character sufficient to create a protected liberty interest.

"Administrative segregation" is defined as segregation of an inmate of an institution for non-disciplinary reasons. WAC 137-32-002. The superintendent may segregate an inmate if the inmate constitutes a threat to the safety of the institution staff, visitors or other inmates; to such inmate's safety; of an escape by such inmate; or to the orderly operation of the institution. WAC 137-32-005. Immediately after an inmate's initial placement in segregation, a hearing officer is required to inform the inmate in writing of the reason for the action and the date, time and place of an initial review meeting. WAC 137-32-010. The initial review meeting must be followed by a classification hearing. WAC 137-32-015. Certain mandatory procedures must be followed at both the initial review meeting and the classification meeting (i.e. preparation of written hearing reports, providing witnesses with witness statement forms etc.).

To the extent due process may mandate that certain additional procedures be followed, those procedures can only reasonably occur after the inmate is already in the dry cell. This is in accord with *Hewitt*, 459 U.S. at 472, which requires that the procedures be followed within a reasonable time after the inmate has been confined in segregation.

Secondly, once Mendoza was infracted because of the balloon incident, he was afforded all of the procedural protections mandated by the Due Process Clause and the WAC

It is clear that the WAC provisions contemplate more of a long-term segregation (i.e. placement in protective custody or in the intensive management unit) than a short term segregation, such as the dry cell. The dry cell policy states that the feces watch should normally be concluded within 84 hours (3 and 1/2 days) or after the equivalent of three normal bowel movements, whichever occurs first. Twenty-four hour extensions can be granted in certain situations such as where the inmate has not had three normal bowel movements, where he is secreting the contraband by a method which would not allow discovery after three normal bowel movements, or where the inmate re-ingests the contraband.

The WAC requires an initial review meeting within two working days after the inmate has initially been placed on administrative segregation status. WAC 137-32-010(2). Classification meetings are required within ten working days after the initial review meeting. WAC 137-32-015(2). Twenty working days after the first classification meeting, an intermediate informal review hearing must be conducted. WAC 137-32-020(1).

The WAC contemplates an inmate being held in segregation potentially in excess of twenty working days. A dry cell watch should normally be concluded in three and a half days or less. In Mendoza's case, he was released from the dry cell within twenty-four hours. Clearly, the State of Washington did not intend the WAC administrative segregation provisions to apply to the dry cell watch. Indeed, it would be unreasonable to require all of the WAC procedures in the relatively short span of a dry cell watch.

(137-28-005 et seq.) in respect to alleged disciplinary violations.[6] These procedures (hearing and appeal) took place within a couple of days after Mendoza's release from the dry cell. It may be that these procedures would make any additional *Hewitt* procedures unnecessary.

5. Denial of Visitation Privileges

As a result of the balloon incident, Mendoza's visiting privileges with his wife and children were suspended for ninety (90) days (Attachment 5, Exhibit C, Ct. Rec. 23). In an October 4, 1989 letter to Mendoza's wife informing her of the suspension, defendant Blodgett stated that the action was being taken "due to your history of attempting to introduce contraband into this institution by way of your children" (Attachment 4, Exhibit C, Ct. Rec. 23).[7]

Mendoza's visiting privileges with his wife were reinstated on or about January 18, 1990 (Attachment 7, Exhibit C, Ct. Rec. 23). The extended family visiting privileges were reinstated on or about May 31, 1990 (Attachment 9, Exhibit C, Ct. Rec. 23).

Mendoza claims there was no constitutionally valid reason for the suspension of the visiting privileges. he claims that the suspension violated his rights to "association, family relationship, marital functioning, privacy and communication." He claims these rights are liberty interests protected by the Constitution. (Ct. Rec. 5).

The suspension of Mendoza's visitations privileges was pursuant to WSP Policy 16.020 (Attachment 10, Exhibit C,

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[6] A disciplinary proceeding is distinct from a segregation proceeding. Whereas a disciplinary proceeding arises from a specifically charged infraction, a segregation hearing arises when the superintendent has reason to believe that the inmate constitutes a threat to the general inmate population.

Mendoza does not claim any due process violation in regard to the disciplinary infraction.

[7] In February 1984, Mendoza's mother had apprently attempted to smuggle contraband to him in the institution and her visiting privileges had been suspended. Those privileges were reinstated in December 1989 (Attachment 6, Exhibit C, Ct. Rec. 23).

Ct. Rec. 23). The regulations provide that visiting privileges may be suspended under the following circumstances: visitors under the influence of drugs or alcohol; insufficient space available; refusal of violator to submit to search procedure; refusal or failure to produce sufficient identification or the falsifying of identifying information by the visitor; behavior that is offensive or disruptive; abusive language to staff or other visitors; other reasons necessary to preserve the security of the institution and order in the visiting room area; violation of institutional visiting rules by the visitor; failure to prevent children from disturbing other persons in the visiting area; excessive physical contact or sexual activity by the visitor or inmate.

Under *Turner v. Safley*, the WSP visitation policy is facially valid. There is a rational connection between the policy and a legitimate governmental interest. Preventing the smuggling of contraband into the institution by visitors is a legitimate governmental interest. The suspension of visitation privileges is a reasonable deterrent to such activity. Indeed, in *Block v. Rutherford*, 468 U.S. 576 (1983), the Supreme Court upheld a blanket prohibition on contact visitation between pre-trial detainees and outside visitors as a reasonable, non-punitive response to security concerns. The Court emphasized that deference to the judgment of prison administrators is necessary when it comes to prison security matters. According to the Court, the Constitution does not mandate contact visits when responsible, experienced administrators have determined in their sound discretion that such visits will jeopardize the security of the facility. 468 U.S. at 589.

The visitation policy operates in a neutral fashion. Based on information provided by staff, the inmate and/or the visitor, only the Superintendent or his designee may remove an individual's name from the Approved Visiting List.

The policy does not foreclose alternative means of exercising the asserted constitutional right. Although physical contact may be eliminated, an inmate can still communicate with his family by letter, telephone, or messages conveyed by family members whose visitation rights have not been restricted. *Robinson v. Palmer*, 841 F.2d 1151 (D.C. Cir. 1988).

Unfettered contact visitation without any regulation would severely impact prison staff and other inmates. As noted, the discretion to suspend visitation for suspected contraband smuggling is vital to maintaining the security of the institution. Finally there is no apparent alternative which would fully accommodate inmate rights at minimal cost to penological interests.

Based on the existing, uncontroverted facts, it appears that defendants had a rational and constitutionally justified basis for suspending Mendoza's visitation privileges. However, the issue of procedural due process prevents this court from making such a ruling as a matter of law.

The specific issue of procedural due process in the context of inmate visitation privileges was recently addressed in the case of *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1989). That case stemmed from two incidents in which individuals were denied the opportunity to visit an inmate at the Kentucky State Reformatory. The mother of one inmate was denied visitation for six months because she brought to the reformatory a person what had been barred for smuggling contraband. Another inmate's mother and woman friend were denied visitation for a brief period when contraband was found on the inmate following a visit by the two women. In both cases, the visitation privileges were suspended without a hearing. *Id.* at 1907.

The Supreme Court held that the inmates did not have a constitutionally protected liberty interest in visitation. First, the Court found that an inmate's interest in unfettered visitation is not guaranteed directly by the Due Process Clause. According to the Court, the denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence" (citing *Hewitt v. Helms*, 459 U.S. at 468). *Id.* at 1908-1909.

Secondly, the Court found that the inmates did not have a state-created liberty interest in visitation. The Court noted that such an interest is created when the State establishes substantive predicates to govern official decision making and further by mandating the outcome to be reached upon a finding that the relevant criteria have been met (citing *Hewitt*, 459 U.S. at 472). *Id*. at 1909.

The Court found that the Kentucky regulations and procedures did provide certain substantive predicates to guide the decision-maker. For example, the procedures provided that a visitor "may be excluded" when officials find reasonable grounds to believe that the "visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with its orderly operation." Among the reasons listed for denying visitation were the visitor's connection to the inmate's criminal behavior, the visitor's past disruptive behavior or refusal to submit to a search or show proper identification, or the visitor being under the influence of alcohol or drugs. The internal procedures of the reformatory were nearly identical to the state procedures and therefore, according to the Court, contained the same "substantive predicates" for denying visitation. *Id*. at 1910.

Despite the presence of "substantive predicates," the Court found that the regulations did not contain requisite relevant mandatory language. The Court cited the Reformatory Procedures Memorandum which stated that "administrative staff reserve the right to allow or disallow visits." The memorandum also stated that it was the policy of the reformatory "to respect the right of inmates to have visits." Therefore, visitors could be excluded if they fell within one of the described categories, but they did not have to be. Conversely, visitors could be excluded even if they did not fall within one of the categories. The Court concluded that the effect of the regulations was not such that an inmate could reasonably expect that a visit would be allowed absent the occurrence of one of the listed conditions. Simply put, the Kentucky regulations did not require that a particular result be reached upon a finding that substantive predicates had been met. *Id.* at 1910-1911.

The WSP visitation policy is similar to the regulations which were at issue in *Kentucky v. Thompson*. The WSP policy provides that a visit *may* be denied or terminated and visiting privileges suspended for various reasons. For this reason, this court finds that the WSP regulations do contain "substantive predicates."

It is not as clear whether the WSP policy contains relevant mandatory language. A visitor *may* be excluded if he falls into one of the listed categories. Like the Kentucky regulations, it is not mandated that the visitor be excluded. However, unlike the Kentucky regulations, this court is unable to determine whether visitors can be excluded under WSP policy even if they do not fall within one of the categories. It is not clear that defendants have reserved the right to allow or disallow visits regardless of the circumstances.

There is an issue of material fact whether Mendoza had a liberty interest in visitation with his wife and family. If there is such an interest, then it will be necessary to determine whether the visitation privileges were suspended without due process.[8]

6. Pendent state law claims

The exercise of pendent jurisdiction is discretionary with the court. Wright and Miller, *Federal Practice and Procedure*, § 3567 et seq. This court will not permit Mendoza to pursue state claims in this lawsuit. The number of prisoner cases filed in this district call for this court to abstain from contemplation of such pendent claims. They shall be brought in state courts.

d. Summary

There are no genuine issues of material fact to preclude this court from ruling as a matter of law: 1) the WSP dry cell policy is constitutionally valid on its face; 2) Mendoza's placement in the dry cell did not amount to cruel and unusual punishment under the Eighth Amendment; 3) Mendoza's placement in the dry cell did not amount to an unreasonable search and seizure in violation of the Fourth Amendment; 4) Mendoza's placement in the dry cell did not amount to a violation of his limited privacy rights; and 5) the WSP visitation policy allowing suspension or termination of visiting privileges is facially valid under constitutional standards.

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[8] Defendants have provided the court with a selected portion of the WSP visitation policy. A review of the entire policy is probably necessary in order to determine whether there is a state-created liberty interest.

There are two remaining genuine issues of material fact. The first issue is whether Mendoza had a state-created liberty interest in not being placed in the dry cell. If so, the next question is whether Mendoza was afforded sufficient process *after* he was placed in the dry cell. This court has already found that there was reasonable suspicion to justify Mendoza's initial placement in the dry cell. Prior to the initial placement, no additional procedures are constitutionally mandated.

The second issue is whether Mendoza had a state-created liberty interest in not having his visitation privileges suspended. If so, it will be necessary to determine whether Mendoza was given sufficient process prior to the suspension.

Defendants noted in their memorandum that a section 1983 claim requires proof showing how each of the named defendants has personally participated in causing the alleged deprivation of a protected right. Defendants summarily argued that Mendoza has not and cannot establish that defendants personally participated in the alleged constitutional violations. However, defendants did not specifically address how Mendoza might have failed to show a lack of personal participation by the defendants and therefore, did not meet their burden on summary judgment. This issue should be addressed by the parties as it may relate to the remaining procedural due process issues.

MOTION FOR APPOINTMENT OF COUNSEL AND AN INTERPRETER

This court has discretion to designate counsel pursuant to 28 U.S.C. § 1915(d) only in exceptional circumstances. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (citations omitted). Determining whether exceptional circumstances exist requires evaluating the chances of success on the merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. *Id.* (citation omitted). "Neither of these factors is dispositive and both must be viewed together before reaching a decision on request for counsel under section 1915(d)." *Id.* at 1331.

A substantial portion of Mendoza's claim has already been disposed of on summary judgment. There is a chance that the remaining procedural due process claims may have some merit. Up to this point, Mendoza has done an adequate job of representing himself. His pleadings, although not perfect, show a sufficient knowledge about the legal issues and the relevant law involved in this case.

Mendoza has had assistance preparing his pleadings and he is continuing to receive assistance. Although Mendoza may no longer be receiving assistance from inmate Wetmore or Mr. Gonzalez, he is now receiving assistance from inmates Belgarde and Lopez. Apparently with the help of Belgarde and Lopez, Mendoza has filed a proposed pre-trial order.

For these reasons, as well as the fact that the remaining issues can probably be handled by cross-motion for summary judgment, this court chooses not to appoint counsel at the present time. Should the matter necessitate a trial, the court will reconsider its decision as well as Mendoza's request that he have the assistance of Belgarde and Lopez at trial. In the meantime, Mendoza should consider making his own efforts to secure an attorney. There is no specific statute which authorizes the court to appoint an interpreter in civil *in forma pauperis* actions. For reasons already set forth above, the court chooses at the present time to deny the motion for an interpreter.

MOTION TO STRIKE AND DISMISS

There is no basis for Mendoza's motion to strike and dismiss the defendants' response to his summary judgment motion. This court has made every effort to address all potential issues raised by Mendoza in his motion and his amended complaint. The court's lengthy discussion about procedural due process should satisfy Mendoza's concern.

CONCLUSION

IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment (Ct. Rec. 22) is **GRANTED IN PART and DENIED IN PART.**

2. Plaintiff's motion for summary judgment (Ct. Rec. 28) is **DENIED.**

3. Plaintiff's pendent state law claims are **DISMISSED** without prejudice.

4. Plaintiff's motion for appointment of counsel (Ct. Rec. 30) is **DENIED.**

5. Plaintiff's motion for appointment of an interpreter (Ct. Rec. 31) is **DENIED**.

6. Plaintiff's motion to strike and dismiss the defendants' response to plaintiff's motion for appointment of counsel and an interpreter (Ct. Rec. 40) is **DENIED.**

7. Plaintiff's motion for objections to the defendants' response to plaintiff's motion for appointment of counsel and an interpreter (Ct. Rec. 40) is **DENIED.**

IT IS FURTHER ORDERED:

1. The parties **SHALL** submit cross-motion for summary judgment on the remaining issues noted by this court (procedural due process and personal participation). Cross-motions, statements of material facts and supporting mem-

orandum **SHALL** be served and filed no later than January 17, 1991.

2. The parties may submit responsive memoranda no later than January 28, 1991.

3. The motions will be heard without oral argument on February 4, 1991.

4. The pre-trial conference scheduled for February 4, 1991 is **HEREBY VACATED** and **CONTINUED** to February 11, 1991 at 9:30 a.m.

5. Jury trial is set for February 26, 1991 at 9:30 a.m. in Spokane.

6. The State of Washington shall transport the plaintiff to the Spokane County Jail on or before February 25, 1991, be responsible for his security when he is in Spokane, have him available for jury selection on February 26, 1991 as later advised; and shall return plaintiff to the Washington State Penitentiary at the close of the trial.

IT IS SO ORDERED. The Clerk shall enter this order and forward copies to plaintiff and counsel for defendants.

DATED this 21st day of December, 1990.

JAMES B. HOVIS
United States Magistrate Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-89-770-JBH

ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

ROGACIANO MENDOZA,

Plaintiff,

v.

JAMES BLODGETT, et al.,

Defendants.

BEFORE THE COURT are the parties' cross-motions for summary judgment (Ct. Rec. 47 and 50) which were filed at the request of the court.

In a previous order (Ct. Rec. 45), this court granted the defendants' summary judgment motion in part. This court found that there was genuine issues of material fact whether plaintiffs procedural due process rights had been violated. The relevant statement of facts is continued in the prior order.

DISCUSSION

1. Feces Watch and Due Process

This court has already found that reasonable suspicion warranted plaintiffs placement on the feces watch. This court also found that the feces watch was a form of administrative segregation which might warrant the use of the procedural protection specified in *Hewitt v. Helms*, 459 U.S. 460 (1983).

Although an inmate's interest in remaining in the general prison population is not independently protected by the due process clause, due process protection can arise where the state has created a liberty interest. A liberty interest does not arise merely because of state-created procedural guidelines. The guidelines must use language of an unmistakably mandatory character showing that they must be used. Furthermore, the guidelines must make it clear that certain actions will not take place in the absence of specified substantive predicates which limit the state official's discretion. *Id.* at 471-472.

This court found that the reasonable suspicion requirement was, in all likelihood, a substantive predicate to the placement of an inmate on the feces watch. Furthermore, this court questioned whether the policy statement that an inmate "will" be placed on the feces watch is a mandatory procedural guideline.

Assuming that there might be a state-created liberty interest, this court rationalized that any additional procedures (i.e. written notice and opportunity for a written response) would only be merited *after* placement of the inmate in the dry cell.

In their cross-motion, defendants argue that the policy does not mandate that all individuals reasonably suspected of secreting contraband be placed on feces watch. According to defendants, the superintendent's discretion is limited by reasonable suspicion only if the dry cell procedure is in fact used. Defendants have submitted the affidavit of Larry Kincheloe who states that the superintendent can use any procedure he desires (i.e. rectal examination, x-ray, etc.) to detect contraband.

Thorough research has failed to uncover any cases which deal with the feces watch in the context of procedural due process. In fact, as is apparent from this court's prior order, the feces watch has not been the subject of many constitutional challenges in general. Essentially, this court is confronted with questions of first impression.

The Pennsylvania statute at issue in *Hewitt* provided that an inmate who has committed a Class I Misconduct "may" be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based on his assessment of the situation and need for control. An inmate "may" be temporarily confined in administrative custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of serious disturbance, or a serious threat to the individual or others. The inmate *shall* be notified in writing as soon as possible that he is under investigation and that he *will* receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation *shall* begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate *must* be released as soon as the reason for the security concern has abated but in all cases within ten days (emphasis added).

The Supreme Court found that Pennsylvania had created a liberty interest because it had gone beyond simple procedural guidelines and had used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed. The repeated use of that language in connection with requiring specific substantive predicates for the placement of an inmate in segregation, such as the "need for control" or the "threat of serious disturbance," created a liberty interest.

Note that Pennsylvania prison authorities did not necessarily have to place inmates in administrative segregation upon finding there was a "need for control" or a "threat of a serious disturbance." They had an option.

In the prior order, this court suggested that upon a finding of reasonable suspicion that an inmate was secreting contraband, prison officials had to place an inmate on feces watch. The court noted the language that an inmate "will" be placed upon feces watch only upon a determination that there is a reasonable suspicion that an inmate is currently secreting contraband (Pg. 1 at Ex. A, Ct. Rec. 23). Based on this language, this court hinted that the feces watch policy might contain the requisite mandatory language and substantive predicate to establish a state-created liberty interest.

Although that analysis, in retrospect, appears perhaps too simplistic, this court remains convinced that the feces watch policy creates a liberty interest. Certainly, it cannot be disputed that prison officials may use methods other than the feces watch when they suspect that an inmate is secreting contraband. However, as in *Hewitt*, this is not dispositive.

The key point is that if the feces watch is to be employed, there must be reasonable suspicion that the inmate is secreting contraband. "Reasonable suspicion" is a substantive predicate just like the "need for control" or the "threat of a serious disturbance." Inmates have a justifiable expectation that they will not be placed on feces watch absent reasonable suspicion that they are secreting contraband. *Vitek v. Jones*, 445 U.S. 480, 489 (1979); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976).

Furthermore, the feces watch policy contains repeated references to mandatory language requiring that certain procedures be used. For example, reasonable suspicion *shall* be individualized suspicion which *shall* be specifically directed to the person who is the target of the search, which *will* be documented. In addition, the past reliability or unreliability of an inmate informant *shall* be considered as well as the specificity of the information provided and whether the inmate has any advantage to be gained from providing the information. The feces watch *shall* normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first (Pg. 1 at Ex. A, Ct. Rec. 23).

Defendants contend that even if there is a state-created liberty interest, the state does not need to provide any additional procedures, other than those which are already mandated under the existing policy.

Defendants contend that the minimum procedures specified in *Hewitt* for administrative segregation should not be applied to the feces watch. Defendants contend that this court errs in characterizing the feces watch as a form of administrative segregation. However, defendants cannot deny that confinement in a dry cell for up to 84 hours is qualitatively different than confinement in the general prison population. The dry cell is a much more restrictive form of confinement. Dry cell confinement, although not as lengthy, is arguably even more restrictive than traditional administrative segregation as that term is defined by Washington Administrative Code (WAC) 137-32 *et seq*.

Defendants argue that additional procedures are not necessary because of the short duration of the dry cell procedure, the limited purpose of the procedure, the periodic 24-hour review of reasons for continuing the procedure beyond the initial 84 hours, the heightened threshold of suspicion to justify initial placement, and the fact that dry cell placement has no impact upon sentence structure or custody status.

The court does not find these reasons persuasive. First, a potential 84-hour stay under the conditions specified for the feces watch cannot be considered "short."

Secondly, the feces watch is no more limited in purpose than regular administrative segregation.

Thirdly, the fact that review is required in order to keep the inmate for an additional period of time does not diminish the fact that the inmate has already spent 84 hours in the dry cell, perhaps without any knowledge of the specific reason why he is there and without any chance to respond. Similarly, the fact that a high threshold of reasonable suspicion is necessary to justify dry cell placement should not prevent the inmate from being informed about the suspicion and having an opportunity for rebuttal.

Finally, it is true that placement in the dry cell will not result in a loss of good time, but placement in administrative segregation does not necessarily entail a loss of good time. And although confinement in the dry cell can be very short, it is a qualitative change in custody status just like administrative segregation.

Because of the similarities between regular administrative segregation and the feces watch, this court finds that *Hewitt* type procedures are required. As noted in the prior order, the need to place inmates in the dry cell as soon as possible, once they are suspected of secreting contraband, mandates that the *Hewitt* procedures be followed only *after* placement.

Procedural due process mandates that within a reasonable time after the inmate has been placed in the dry cell, he should be given some notice of the specific factual reasons for the action. *Hewitt* does not specify that the notice be in writing, although as a practical matter, it will be easier to verify the contents of the notice and the fact that notice was given if there is something in writing.[1] Oral notice is permissible; however, prison officials should devise some method of recording that such notice was in fact given and documenting the contents of the notice (i.e. feces watch log). The notice should not divulge the identity of confidential informants nor any other information that prison officials justifiably consider as compromising to the security of the institution.

Once the inmate has received notice, due process mandates that he be given a chance to respond by way of a written statement. The right to make a written statement must be exercised in a manner consistent with preventing the concealment or destruction of contraband. While the inmate is in the dry cell, a reasonable period of time should be set aside for the inmate to prepare the statement. This will have to be done under the supervision of presumably the feces watch officer.[2]

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[1] The purpose of the dry cell watch is to seize any contraband before it can be destroyed by the inmate. To that end, prison officials justifiably restrict the inmate's access to any materials which could be used to conceal or destroy contraband. Conceivably, even a written notice could be used for such purposes. Prison officials may have to make some type of adjustment to accommodate such a concern. Reading the notice to the inmate would probably be sufficient.

The current feces watch policy at WSP provides that the shift lieutenant who is on duty when the inmate is placed in the dry cell shall give the inmate a copy of the DOP (Division of Prisons) Directive informing him of the search procedure. However, the inmate may not keep the copy of the directive in the dry cell. (Pg. 7 at Ex. B, Ct. Rec. 23). Perhaps a similar procedure could be used to fulfill the notice requirement.

The superintendent or his designee should then review the written statement in conjunction with his reasonable suspicion that the inmate has been secreting contraband. If the statement does not reduce his suspicion, the inmate may continue to be held in the dry cell. The court notes that *Hewitt* says nothing about an oral or written decision being communicated to the inmate. As long as the inmate's response has been considered, this is sufficient.[3]

Defendants may consider such additional procedures to be unduly burdensome formalities. However, the real possibility that an inmate's response may eliminate suspicion that he is secreting contraband is enough to justify the additional procedures. In *Hewitt*, the Supreme Court found the private interest at stake "not one of great consequence" because the inmate was merely transferred from one extremely restricted environment to an even more confined situation. 459 U.S. at 473. Nonetheless, the Court still required that certain minimum procedures be followed. This court is requiring no more from these defendants.

2. Visitation and Due Process

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[2] The court notes that under current feces watch policy, inmates are allowed, under certain restrictions, to maintain paperback books, to review legal mail, make arrangements to meet court deadlines and make emergency phone calls (Pg. 10 at Ex. B, Ct. Rec. 23).

If these things can be accommodated, surely there should not be a problem in allowing the inmate the opportunity to prepare a written statement, subject to the same restrictions.

[3] For their own protection, the superintendent or his designee should probably have some method of documenting that the inmate's response was considered.

Based on the visitation regulation at issue in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), this court found that the WSP visitation policy contained the requisite "substantive predicates" necessary for creation of a liberty interest. Specifically, the WSP policy gives prison officials the option to deny visits if it poses a potential threat to the security of the penitentiary.

The remaining question is whether WSP policy also contains relevant mandatory language. In *Kentucky*, the Court found that such language was absent because administrative staff had reserved the right to allow or disallow visits regardless of whether the prospective visitor fell within one of the listed categories defined as a security risk (i.e., the visitor having connections with the inmate's past criminal behavior).

Defendants submit that WSP policy, like the Kentucky regulation, does not mandate termination or suspension of a visit if the prospective visitor falls within a certain category. The superintendent retains discretion.

According to WSP policy, the number of visitors an inmate may receive and the length of visits *shall* be limited only by the institution's schedule, space and personnel requirements. Inmates *shall* not be denied visitation with persons of their choice except: 1) persons associated with him in the commission of the offense for which he was incarcerated; 2) minor children who are identified as victims of sexual molestation by the inmate; 3) parolees and probationers under supervision unless authorized by the Superintendent or his designee; 4) ex-offenders unless authorized by the Superintendent or his designee; 5) persons under 18 years of age may not participate as a member of a group visiting within the security perimeter of the institution. (Pp. 2-3 to Ex. I, Ct. Rec. 50).

Inmates must submit a list of names and addresses of proposed visitors. Staff *shall* approve persons for an inmate's visiting list in accordance with the following guidelines: 1) list of approved visitors (only visitors who have completed the attached questionnaire and have been approved for visiting); 2) all persons under the age of 18 or over the age of 16 may be placed on an inmate's visiting list by submitting a notarized signature from their legal guardian on the original visiting questionnaire; 3) all inmates are allowed ten (10) persons on the visiting list; 4) parolees and probationers (not under supervision) unless authorized by the Superintendent or his designee; 5) all children must be accompanied by their parent or legal guardian with any exceptions to be arranged through the inmate's counselor; 6) visitors may only be on one approved visiting list at a time except as provided. (Pg. 7 to Ex. I, Ct. Rec. 50).

Based on these excerpts from the visitation policy, this court concludes that WSP inmates do have a "justifiable expectation" that they will receive visits upon the occurrence of certain conditions. Visits cannot be denied for any reason or for no reason at all. Unlike the Kentucky regulation, this court cannot find where WSP prison staff have specifically reserved the right to allow or disallow visits. To the contrary, WSP policy states that inmates "*shall not be denied visitation*" (emphasis added).

The WSP visitation policy also contains numerous references to explicit mandatory language requiring that certain procedures be employed in order to deny visitation with certain individuals. For example, when an individual is not approved for visitation, notice of and reasons for the exclusion *shall* be given to the inmate who submitted the individual's name (emphasis added). (Pg. 7 to Ex. I, Ct. Rec. 50). In addition, although the Superintendent or his designee may remove an individual's name from an approved visiting list for a specified period, a written notice of the decision *shall* be given to the inmate and to the visitor (emphasis added). (Pg. 9 to Ex. I, Ct. Rec. 50).

The next question is whether WSP procedures for denying visitation are sufficient under the Due Process Clause. This court believes that they are. Those procedures are consistent with the procedures set forth in *Hewitt*. Nothing beyond that is merited.

Balancing the private interest in visitation versus the governmental interest in maintaining institutional security, the latter clearly carries more weight. Prison is a restricted environment and strict regulation of visitation is to be expected. Similarly, safety of guards and other inmates is the fundamental responsibility of prison administration. *Hewitt*, 459 U.S. at 473 (citations omitted).

The decision to disapprove a particular visitor or to terminate or suspend visitation would not be assisted by detailed adversary proceedings. As stated in *Hewitt*, "prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se* and the like." *Id*. at 474.

As noted, when an individual is not approved for visitation, WSP policy requires that notice of and reasons for the exclusion be given to the inmate. The inmate may appeal the decision to the superintendent or his designee. (Pg. 7, Ex. I at Ct. Rec. 50).

When an individual's name is temporarily or permanently removed from the visiting list, written notice is given to both the inmate and the visitor. WSP policy provides that the statement of reasons may be deleted or limited in details. Depending on the particular circumstances, security concerns may warrant limiting or deleting the statement of reasons. For example, it would be prudent that prison officials not divulge the name of inmate informants. As long as this option is not exercised arbitrarily, this court believes that due process requirements are met.[4]

As noted, visiting privileges can only be denied by orders of the superintendent or his designee. When a suspension of visiting privileges is imposed as part of a formal disciplinary proceeding, the superintendent or his designee will have final approval. Of course, in that scenario, the inmate will be afforded the procedural protections which accompany disciplinary proceedings. In the instant case, Mendoza was afforded those protections and the superintendent dismissed the disciplinary infraction. There was no suspension of visiting privileges imposed as part of the infraction.

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[4] A similar restriction in the feces watch policy would be reasonable.

Pursuant to WSP policy, the superintendent suspended the visiting privileges of Mrs. Mendoza. Technically, Mrs. Mendoza was assessed blame for the balloon incident rather than Mr. Mendoza. WSP policy provides that a visitor who has had his or her visiting privileges suspended may submit written statements in opposition to the suspension. Mendoza may argue that he should have been given an opportunity to respond because his visitation rights were also at stake, but as long as the visitor gets a chance to respond, due process is satisfied.[5]

The record shows that defendants fully complied with the above procedures in suspending Mrs. Mendoza's visitation. Both Mendoza and his wife were given written notice of and the reasons for the suspension (Attachments 4 and 5, Exhibit C, Ct. Rec. 23). Mrs. Mendoza made a written request for reinstatement of those privileges and the request was granted (Attachment 7, Exhibit C, Ct. Rec. 23). Furthermore, in his appeals on the disciplinary infraction, Mendoza had an opportunity to personally express his opinions about the incident. (Exhibits K and L, Ct. Rec. 50). The record shows that defendant Kincheloe considered both Mr. and Mrs. Mendoza's response (Attachments 5, 7 and 12, Exhibit C, Ct. Rec. 23).

3. Personal Participation

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[5] Realistically, the visitor would probably present the same arguments and evidence as the inmate would offer. Under certain circumstances, the visitor will know more than the inmate about the allegations used to support a suspension of visiting privileges.

In addition, at some point, the inmate can apply to have the visitor reinstated on his approved visiting list. If that request is denied, the inmate is provided with a notice of the reasons for the exclusion and has a chance to appeal the decision.

A complaint must set forth the specific facts upon which plaintiff relies in claiming the liability of each defendant. Fed. R. Civ. P. 8(a)(20); *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Even a liberal interpretation of a civil rights complaint may not supply essential elements of a claim that the plaintiff failed to plead initially. *Ivey*, 673 F.d at 268. In order to establish liability pursuant to section 1983, plaintiff must set forth facts demonstrating how each defendant caused or personally participated in causing a deprivation of plaintiff's protected rights. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Under section 1983, a person deprives another of a constitutional right "if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains].'" *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) *quoting Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (emphasis original). Plaintiff cannot hold a defendant liable solely on the basis of his supervisory position because the Civil Rights Act does not permit liability under respondeat superior. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (citing *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691-95 (1978)).

Mendoza's amended complaint alleges that the feces watch was authorized and promulgated by defendants Kincheloe, Blodgett, Lambert and Van Boening. It also alleges that the policy was specifically approved by that group of defendants. Mendoza's third cause of action contends that Blodgett acted under color of state law to punish plaintiff without due process. His fifth cause of action states that Kincheloe, Blodgett, Van Boening and Lambert violated plaintiff's constitutional rights by creating, promulgating, adopting and approving of the feces watch policy. (Ct. Rec. 5).

Defendants contend that only Kincheloe and Blodgett could possibly be held responsible for procedural due process violations. This is because Kincheloe, when he was WSP superintendent, signed the original feces watch policy and Blodgett, as current superintendent, implemented the policy. (See affidavit of Kincheloe at Exhibit H to Ct. Rec. 50).

Beyond very general assertions, the record fails to show how any of the other defendants were involved in denying plaintiff of procedural due process. There is no reason to believe that the associate superintendents (Van Boening and Lambert) have any power to authorize the feces watch policy or are specifically entrusted with its implementation. They simply followed the policy as directed by either defendant Kincheloe or defendant Blodgett. There are no allegations, general or specific, that defendants Jones and Edwards were involved in alleged procedural due process violations or that either had any role in authorizing or promulgating feces watch policy.

For these reasons, a section 1983 suit cannot be maintained against defendants Van Boening, Lambert, Jones and Edwards.

4. Qualified Immunity

"[G]overnment officials performing discretionary functions [] generally are shielded from liability for civil damages [in a section 1983 action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635 (1987). Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640-641. In other words, "in the light of preexisting law the unlawfulness must be apparent." *Id.* See: *Lum v. Jensen, et al.*, 876 F.2d 1385 (9th Cir. 1989) *cert den*. 110 S. Ct. 867 (1990); *The Presbyterian Church (USA) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989); *Tribble v. Gardner, et al.*, 860 F.2d 321 (9th Cir. 1988) *cert den*. 109 S. Ct. 2087 (1989).

To determine whether a right is clearly established, "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district court. . . ." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert den*. 483 U.S. 1020 (1987). An additional factor that may be considered is "a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue." *Tribble v. Gardner*, (cited supra); *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). Government officials are charged with knowledge of constitutional developments, including all available decisional law. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988).

Defendants contend that even if the feces watch policy did not meet procedural due process requirements, they are qualifiedly immune from liability. According to defendants, there is no rule of thumb for determining if a statute or regulation has created a liberty interest. Furthermore, defendants argue that even if there is a state-created liberty interest, the procedures mandated by the due process clause vary with the private and governmental interests at stake.

This court is perplexed by the lack of published decisions addressing the constitutional aspects of the feces watch. The feces watch is no doubt a common procedure used in penal institutions across this country. As far as this court can tell, the question of what procedural due process rights attach to a feces watch is one of first impression.

There is no exact formula for determining whether a statute or regulation contains "substantive predicates" and "relevant mandatory language." However, the Supreme Court has set forth some adequate guidelines. Those guidelines should give a reasonable person some idea of whether a statute or regulation creates a liberty interest. At the very least, if there is any question in a reasonable prison official's mind, it is better to assume that an interest has been created.

The court finds the defendants' second argument much more persuasive. A reasonable prison official could believe that documented reasonable suspicion, by itself, is sufficient to satisfy procedural due process concerns about the feces watch. Defendants have offered reasons for not instituting additional procedures for the feces watch (short duration of the feces watch, limited purpose, etc.). These reasons, although not convincing to this court, cannot be dismissed out of hand. This is especially true in view of the Supreme Court's mandate that substantial deference be given to prison officials in matters of institutional security.

Under the doctrine of qualified immunity and the facts herein, this court finds defendants Blodgett and Kincheloe immune from a judgment for damages.

5. Miscellaneous

In his cross-motion for summary judgment, Mendoza raises First Amendment claims of access to the court and freedom to exercise religion. Because these issues were not raised in the amended complaint, the court will not address them on summary judgment.

Mendoza also reasserts constitutional claims which this court dismissed in its first order. The court will not reconsider its decision on those claims.

CONCLUSION

WSP visitation policy creates a liberty interest protected by the Due Process Clause. Existing procedures were sufficient to safeguard plaintiff's interest.

The feces watch policy at issue in this case created a liberty interest in plaintiff. The safeguarding of that liberty interest requested procedures consistent with the due process clause. *Hewitt* as an analogy, an informal, non-adversarial process appropriate. At a minimum, this process includes notice to the inmate, an opportunity for the inmate to respond in writing, and consideration of the inmate's response by prison officials. Due to the nature of the feces watch, these additional procedures are appropriate only after the inmate's initial placement on the feces watch.

The policy pursuant to which plaintiff was placed on the feces watch did not afford him these procedural protections. The court declares that policy invalid insofar as procedural due process is concerned. Obviously, this ruling is of limited effect since that particular policy was repealed by prison officials and superseded by a new policy. For the same reason, injunctive relief is of no use.

This court cannot award damages since the defendants are immune from suit.

IT IS HEREBY ORDERED:

1. Defendants' cross-motion for summary judgment is GRANTED.

2. Plaintiff's cross-motion for summary judgment is DENIED.

3. Plaintiff's amended complaint and the defendants named therein are DISMISSED with prejudice.

The Clerk is DIRECTED to send copies of this order to counsel and the plaintiff and to enter judgment dismissing complaint.

DATED this 7th day of February, 1991.

JAMES B. HOVIS
United States Magistrate Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-35303
D.C. NO. C-89-770-JBH

ROGACIANO GONZALES MENDOZA,
Plaintiff-Appellant,
v.
JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,
Defendants-Appellees.

NO. 91-35305
D.C. NO. C-89-770-JBH

OPINION

ROGACIANO GONZALES MENDOZA,
Plaintiff-Appellee,
v.
JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Washington
James B. Hovis, Magistrate, Presiding

Argued and Submitted
February 4, 1992--Seattle, Washington

Filed April 1, 1992

Before: Procter Hug, Jr., John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that a state prisoner had a state-created liberty interest under the prison's dry cell policy which gave him the right to procedural due process and that although the prison officials violated this right, they were entitled to qualified immunity.

Appellant Rogaciano Gonzales Mendoza, an inmate at a state prison, filed a Section 1983 complaint against the prison officials alleging that he possessed a liberty interest, requiring prison officials to follow the procedures outline in the former dry cell watch regulation, as well as those set forth in Washington Administrative Code sections involving administrative segregation. While being visited by his wife and children, prison officials discovered on the floor of the visiting area a balloon thought to contain contraband. Mendoza was placed on a dry cell watch for the purpose of inspecting bowel movements for contraband. Although no contraband was found, a hearing was subsequently held on the infraction charge. Mendoza was found guilty of attempting to smuggle contraband into the prison but, subsequently, the infraction was dismissed. Notwithstanding the dismissal of the infraction Mendoza's visitation rights with his wife and children were suspended for 90 days. The district court granted summary judgment for the prison officials and against Mendoza's attempt to vindicate his asserted rights to procedural due process under the dry cell policy and the visitation regulations.

[1] A state creates a protected liberty interest when it places substantive limitations on official discretion by adopting regulations that establish "substantive predicates" to govern official decisionmaking and mandating the outcome to be reached upon a finding that the relevant criteria have been met. [2] The regulations also must contain explicitly mandatory language. [3] As such, the prison's former dry cell watch regulation created a liberty interest.

A prisoner could be put upon such a watch only upon determination that there is reasonable suspicion that he is currently secreting contraband. [4] The duration of the watch was also subject to particularized criteria. As such, the prison officials had no discretion to fail to follow dry cell watch procedures. [5] The court did not need to decide whether the Washington state Administrative regulations governing the placement of prisoners in administrative detention created a liberty interest because[6] they were aimed at long-term segregation when the inmate posed a threat to the general prison population, himself, or the institution. [7] However, the after-the-watch hearing in this case was insufficient to accord Mendoza due process. The prison's failure to provide this minimum level of due process violates the procedural due process rights of an inmate placed on the dry cell watch. [8] However, because the impropriety of the prison officials' conduct was not clearly established before this case, they were entitled to qualified immunity.

[9] Having determined that the prison visitation regulations created a liberty interest, the court concluded that Mendoza's private interest in uninterrupted visits from his wife and children was relatively minor in this case to violate due process. [10] The visitation privileges had been suspended because of Mrs. Mendoza's actions and previous attempts at smuggling contraband into the prison. Not being a party to this action, her husband did not have standing to assert her rights.

COUNSEL

E. Christina Beusch, Assistant Attorney General, Olympia, Washington, for the defendants-appellees-appellants.

Kristin Bjorkman and Thomas G. Myrum, Legal Interns, supervised by Maureen Laflin, University of Idaho Law School, Moscow, Idaho, for the plaintiff-appellant-appellee.

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

Rogaciano Gonzales Mendoza, an inmate at the Washington State Penitentiary at Walla Walla ("the prison") filed a civil rights action pursuant to 42 U.S.C. § 1983. Mendoza alleged that the defendants, administrators and correctional officers at the prison, deprived him of procedural due process under the fourteenth amendment in the implementation of the prison's "dry cell" policy[1] and the prison's and state's visitation policy. The district court[2] granted summary judgment for the defendants. Mendoza appeals the district court's determination that the defendants are entitled to qualified immunity;[3] the defendants cross-appeal the district court's determination that Mendoza had a protected liberty interest under the prison's dry cell policy and under visitation regulations promulgated by the prison and the state.

We have jurisdiction under 28 U.S.C. § 1291 and we affirm. We hold that Mendoza had a state-created liberty interest under the prison's dry cell policy which gave him a right to procedural due process. The defendants violated this right, but they are entitled to qualified immunity.

We also hold that Mendoza had a state-created liberty interest which entitled him to procedural due process under the prison's and the state's visitation regulations; the defendants did not violate this right.

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[1] We use the term "dry cell" policy interchangeably with the term "feces watch" policy.

[2] The parties agreed that a magistrate would decide the cross-motions for summary judgment.

[3] Mendoza's complaint also alleged that the implementation of the dry cell policy violated his first, fourth, eighth and ninth amendment rights. The district court dismissed these claims, and Mendoza has not appealed their dismissal.

FACTS AND PROCEDURE

On September 29, 1989, Mendoza was visited by his wife ("Mrs. Mendoza") and six children in the visiting room of the prison. Correctional officers monitored the visit. Mendoza's children requested use of the restroom. A correctional officer unlocked the door and prepared to lead the children to the restroom. She noticed on the floor a balloon covered with a white slimy substance and the tip bitten off. No other prisoners or visitors had been in the area.

The officer informed her supervisor, who in turn contacted Associate Superintendent Lambert. According to the defendants, Lambert knew from his years of experience that balloons commonly were used to smuggle drugs into the institution. Lambert claimed he had a reasonable belief that Mendoza had ingested a balloon or balloons filled with narcotics.

Mendoza was charged with an infraction of prison rules and placed on a dry cell watch. Under this procedure, an inmate is placed in a custody-locked cell for the purpose of maintaining and inspecting at least three consecutive normal bowel movements for contraband. According to the dry cell procedure in place at the time of the incident, "[f]eces watches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate." Former Institutional Order (I.O.) 09053.[4] "Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first." *Id.*

Mendoza's dry cell watch began at 8:40 p.m. on September 29, 1989. He was placed in a hospital cell, strip-searched and given a clean pair of shorts. He slept on a mattress on the floor without a blanket, conforming with the dry cell watch requirement that the hands of a prisoner be visible at all times. Mendoza was held in the cell for 24 hours. During that time he was fed three meals and he defecated five times. The prison authorities found no contraband.

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[4] A new procedure, "Dry Cell Search Procedure," WSP 420.311, has been in effect since March 7, 1990. The new procedure is considerably more lenient than the one in effect at the time of this incident; inmates may receive personal mail, file emergency court papers, wear a religious medallion and wedding ring, have one paperback book, magazine, or paper and pencil, use a blanket, and make emergency telephone calls. WSP 420.311(VII)F.2. The new procedure has mooted Mendoza's claim for injunctive relief.

Mendoza was released from the watch at 8:41 p.m. on September 30, 1989. Within five days thereafter, a hearing was held on the infraction charge. Mendoza was found guilty of attempting to smuggle illegal contraband into the institution. However, on November 3, Superintendent Blodgett conducted his own investigation and determined that although the corrections officers had reasonable suspicion to place Mendoza on the dry cell watch, there was insufficient evidence of Mendoza's direct involvement in smuggling, and the infraction was dismissed.

Notwithstanding the dismissal of the infraction charge, Mendoza's visitation privileges with his wife and children were suspended for 90 days. In a letter to Mrs. Mendoza, Blodgett stated that "[d]ue to your history of attempting to introduce contraband into this institution by way of your children, I have no recourse but to believe this was again your intention."

The district court granted summary judgment, dismissing Mendoza's civil rights action in which he sought to vindicate his asserted rights to procedural due process under the dry cell policy and under the visitation regulations. This appeal followed.

DISCUSSION

A. Standard of Review

We review a district court's grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

B. Liberty Interest Created by the Dry Cell Watch Procedure

1. State-Created Liberty Interests

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend XIV, § 1. Mendoza argues that he possesses a liberty interest, requiring prison officials to follow the procedures outline in the former dry cell watch regulation, as well as those set forth in Washington Administrative Code sections involving administrative segregation.

A liberty interest may arise from either of two sources: the due process clause or state law. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Toussiant v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Mendoza does not argue that the due process clause itself provides him the liberty interest he contends was abridged. Rather, he argues the Washington Administrative Code and the former dry cell watch regulation created that liberty interest.

[1] A state creates a protected liberty interest when it places substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). The most common way a state creates such an interest is by adopting regulations which establish "substantive predicates" to govern official decisionmaking and by mandating the outcome to be reached upon a finding that the relevant criteria have been met. *Id*. There must be particularized standards or criteria to guide the state's decisionmakers, and the criteria must serve to limit discretion. *Id*. If a decisionmaker can make his decision for any constitutionally permissible reason or for no reason at all, the state has not created a liberty interest. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

[2] The regulations also must contain "'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Kentucky Dep't of Corrections*, 490 U.S.

at 463 (citing *Hewitt*, 459 U.S. at 471-72). Although a search for mandatory language necessarily focuses on words such as "shall" and "will," mere use of these words is insufficient. *Toussiant*, 801 F.2d at 1098. Rather, the search is for "*relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." *Kentucky Dep't of Corrections*, 490 U.S. at 464 n.4 (emphasis in original).

2. Former Dry Cell Watch Procedure

[3] The prison's former dry cell watch regulation creates a liberty interest. It provides particularized standards and criteria. A prisoner can "be placed upon Feces Watch *only upon determination* that there is reasonable suspicion that [he] is currently secreting contraband." Former I.O. 09.053 (emphasis added). Reasonable suspicion

> [s]hall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

Id.

[4] The duration of the watch is also subject to particularized criteria. "Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first." *Id.* The regulation allows 24-hour extensions by the superintendent or his designee "where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period," in cases where "there is specific and reliable information" the subject of the search is "secreting contraband on his person by means of a method which would prevent it from being passed after three normal bowel movements, or

the equivalent thereof," or "in the event of no bowel movements or re-ingesting the contraband." *Id.*

The regulation contains "explicitly mandatory language." *See Hewitt*, 459 U.S. at 472. The decisionmaker must decide whether to place a prisoner on a dry cell watch by determining if reasonable suspicion exists. Further, the decisionmaker may extend the duration of the watch only under the conditions outlined in the regulation.

The defendants mistakenly focus upon the question whether the superintendent has discretion *not* to place a prisoner on a dry cell watch even though he may have reasonable suspicion that the prisoner has secreted contraband. The relevant question is whether the superintendent has discretion to *fail* to follow dry cell watch procedures once he determines to place a prisoner on a watch. The substantive predicates and explicitly mandatory language indicate he has no such discretion. The regulation creates a protected liberty interest.

3. Administrative Segregation Regulations

[5] Mendoza also argues that the Washington state administrative regulations governing the placement of prisoners in administrative detention, Washington Administrative Code ch. 137-32, create a liberty interest. We need not reach this issue, because these regulations are inapplicable to the dry cell watch procedure at issue here.

[6] The Washington state administrative segregation regulations are aimed at long-term segregation when the presence of the inmate in the general population poses a serious threat to the inmate or others or the orderly operation of the institution. *See* Wash. Admin. Code § 137-32-005. They are not aimed at confiscating contraband. We agree with the district court that "the State of Washington did not intend [these] administrative segregation provisions to apply to the dry cell watch. Indeed, it would be unreasonable to require all of [such] procedures in the relatively short span of a dry cell watch."

C. What Process is Due?

The Supreme Court in *Hewitt* described the very limited procedural protections afforded prisoners.

> The requirements imposed by the [due process] Clause are, of course, flexible and variable dependent upon the particular situation being examined. In determining what is "due process" in the prison context, we are reminded that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison." "Prison administration ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."

Hewitt, 459 U.S. at 472 (citations omitted).

Hewitt concerned the placement of an inmate in administrative segregation. The Court held that an informal, nonadversary evidentiary review is sufficient "both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him." *Id.* at 476. An inmate has the right to notice and the right to be heard. An informal proceeding "must occur within a reasonable time" following the inmate's placement in administrative segregation, taking into account "the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials." *Id.* at 476 n.8. In *Hewitt*, prison officials satisfied due process through a hearing "[o]nly five days" after the inmate's transfer to administrative segregation. *Id.* at 477.

Having determined that the state has created a liberty interest by its dry cell watch regulation, we must decide whether the process afforded Mendoza satisfied the minimum requirements of procedural due process under the fourteenth amendment. To determine this question, we consider Mendoza's private interests, the governmental interests, and the value of the procedural requirements. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Mendoza's private interests were substantially affected by the dry cell watch. The watch procedures in effect at the time were extremely unpleasant. Pursuant to those procedures, Mendoza was permitted to wear only shorts. He was confined in the cell on a mattress on the floor without a blanket.[5] He was not permitted to shower, although he was provided a wash cloth, a face towel, a bar of soap, toothbrush and tooth powder, and a wash basin at specified times. He was subjected to a continuous watch by a prison guard. He had to keep his hands in sight at all times, and his feces and urine were meticulously examined.

The prison officials' interests were triggered by Mendoza's suspected involvement in smuggling contraband into the prison. Prompt action was required. Illicit drugs smuggled into a prison create discipline problems, lead to further crime, and increase health dangers to inmates. The officials' response to this threat by implementing the dry cell watch policy was justified. Mendoza does not dispute this. Rather, he challenges the constitutionality of the procedures afforded a prisoner placed on the dry cell watch. We turn now to a consideration of this question.

Mendoza received a hearing within five days after the end of his placement on the watch. By this time, however, Mendoza had suffered all the indignities the watch demands.

[7] Such an after-the-watch hearing in this context is insufficient to accord the prisoner due process. The prisoner is entitled to notice of the reason for being placed on the watch, and an opportunity to respond in writing, within a reasonable time after the commencement of the watch. No formal hearing is required, but the prisoner's response must

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[5] A thermometer was located at the front of Mendoza's cell. The temperature ranged between 78-82 degrees during the course of the watch. The prison regulation required that the cell temperature be at least 68 degrees Fahrenheit.

be given some consideration. The failure to provide this minimum level of due process violates the procedural due process rights of an inmate placed on the dry cell watch. Accordingly, we hold Mendoza's rights to procedural due process were violated.[6]

D. Qualified Immunity

As a general rule, an official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court must "identify the applicable law and determine whether that law was 'clearly established' at the time the defendants acted." *Alexander v. Perrill*, 916 F.2d 1392, 1396 (9th Cir. 1990). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court explained that the

> contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citation omitted).

No case, before the present one, has been cited to us, nor have we found any, in which a court has considered what process is due an inmate placed on a dry cell watch. Nor is there any preexisting law which would have indicated any apparent unlawfulness of the failure to provide a prisoner placed on such a watch with notice of the reason for that action, an opportunity to respond, and consideration of the response.

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[6] Mendoza also argues that the prison violated its own former dry cell policy when it continued the watch after Mendoza completed his third bowel movement. We disagree. The former dry cell watch procedure stated that the search "shall normally" be concluded within 84 hours of a prisoner's placement on watch, or after the equivalent of three normal bowel movements, whichever occurs first. Former I.O. 09.053. Mendoza had his third bowel movement at 10:56 a.m., but was held an additional nine hours and after two more bowel movements.

The "shall normally" language gave prison official some leeway to hold a prisoner for more than three bowel movements if within the 84 hour period. It is only in cases where the inmate "has not had the equivalent of three normal bowel movements within the 84 hour period" that the superintendent must authorize further 24 hour extensions. *Id.*

[8] This absence of decisional law or regulatory requirement is probative of the question whether a right is clearly established. *Alexander v. Perrill*, 916 F.2d at 1398. Following *Hewitt*, the defendants reasonably could have believed that a post-watch hearing met constitutional requirements. Because the impropriety of the defendants' conduct was not clearly established before this case, the defendants are entitled to qualified immunity.

E. Liberty Interest Created by Visitation Regulations

Mendoza argues that Washington state administrative rules, and prison regulations, concerning visitation policy create a liberty interest protected by the fourteenth amendment. He contends the defendants violated this interest by suspending his wife's and children's visitation for 90 days.

As with the dry cell watch policy, a state created liberty interest exists only when the regulations contain substantive predicates and explicitly mandatory language. In *Kentucky Dep't of Corrections*, 490 U.S. 454, the Supreme Court considered whether Kentucky prison regulations created a liberty interest in receiving visitors. The regulation stated in part that "[a]lthough administrative staff reserves the right to allow or disallow visits, it is the policy of the Kentucky State Reformatory to respect the right of inmates to have visits in the spirit of the Court decisions and the Consent Decree, while insuring the safety and security of the institution." *Id.* at 457. It also contained a nonexhaustive list of nine specific reasons for excluding visitors. *Id.*

The Court stated that these regulations provided certain "substantive predicates" to guide the decisionmaker, such as the statement that visitors could be excluded when officials found reasonable grounds to believe that the "visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with [its] orderly operation." *Id.* at 463. However, the Court went on to hold that the regulations did not contain sufficient explicit mandatory language to create a protected liberty interest. "The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions." *Id.* at 464-65.

The present case is distinguishable from *Kentucky Dep't of Corrections.* Here, we focus upon the procedures for suspension and termination of visitation rights, and not on Washington or prison visitation policy in general, because this is the language *relevant* to the prison official's decision to exclude Mrs. Mendoza. *See id.* at 464 n.4 (focus must be upon *relevant* mandatory language).

The prison's Institutional Order 16.120(VI)C provides in pertinent part that

> 1. A visit may be denied or terminated and visiting privileges suspended under the following circumstances:
>
> > . . .
> >
> > e. Violation of institutional visiting rules by visitor.
> >
> > . . .
> >
> > h. Other reasons for denying, terminating, or suspending a visit as reasonably necessary to reserve the security of the institution and reasonable order in the Visiting Area.
> >
> > . . .
>
> 2. Based upon information provided by staff, the inmate and/or visitor, the the [sic] Superintendent or his designee may remove an individual's name from an Approved Visiting List for a specified period, indefinitely or permanently. A written notice of the decision shall be given to the inmate

> and to the visitor. The statement of reasons may be deleted or limited in details.
>
> . . .
>
> 4. Visiting privileges shall be denied only by orders from the Superintendent or his designee. When the suspension is imposed as part of a formal disciplinary proceeding, the Superintendent or his designee will have final approval. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting.) A visitor who has had his/her visiting privileges suspended may submit written statements in opposition to the suspension.
>
> . . .

In addition to this institutional order, Washington Administrative Code § 275-80-930 provides that the visiting rights of a prisoner may be suspended

> only after a finding of guilt pursuant to a regular disciplinary hearing and such rights may be abridged for a maximum duration of 90 days after which visiting rights shall be restored unless there remains a clear and present, or imminent danger to the health and safety of any visitor, resident or staff member.

These regulations contain the "substantive predicates" necessary to the creation of a liberty interest. Visiting rights may be suspended "only after a finding of guilt pursuant to a regular disciplinary hearing." Visiting privileges may be denied under an enumerated list of circumstances. "A written notice of the decision" shall be given to the inmate and the visitor."

Unlike the prison regulations in *Kentucky Dep't of Corrections*, the regulations in this case contain explicit mandatory language. Prison officials may suspend visiting privileges *only* after a finding of guilt. Written notice *shall* be given. The regulations do not provide that the administrative staff "reserves the right" to allow or disallow visits.

Thus, an inmate may reasonably form an objective expectation that visiting privileges will not be suspended without compliance with the applicable rules. *Cf. Kentucky Dep't of Corrections*, 490 U.S. at 464-65.

F. What Process is Due?

To determine what process is due, it is necessary once again to turn to the factors set out in *Mathews v. Eldridge*.

[9] Mendoza's private interest in uninterrupted visits from his wife and children is relatively minor in this case. The suspension was limited to 90 days. It did not affect Mendoza's rights to parole, good time credits, or privileges in the prison. Prison officials, on the other hand, have a strong interest in preventing visitors from smuggling drugs into the prison.

Finally, Mendoza was given an informal infraction hearing. He was initially found guilty of attempting to smuggle contraband into the prison, and his visitation privileges with his wife and children were suspended for 90 days. The infraction was subsequently dismissed, but Mendoza's visitation privileges with his wife and children were continued for the 90-day period. These visitation privileges were not reinstated because of the circumstances under which the balloon had been discovered, and Mrs. Mendoza's prior conduct. The Mendoza children had been the only people in the area where the balloon was found, and Mrs. Mendoza had tried to smuggle contraband to her husband in the prison on prior occasions.

Mendoza argues that when the defendants refused to reinstate his visitation privileges after the infraction charge against him had been dismissed, they violated Washington Administrative Code § 275-80-930. He contends that under this code section his visitation rights could be suspended "only after a finding of guilt pursuant to a regular disciplinary hearing." He argues he was cleared of the charges, and thus the visitation rights should have been reinstated. We reject this argument.

[10] Prison officials have the right to suspend the visiting privileges of a *visitor* who attempts to smuggle drugs into the prison regardless of the guilt or innocence of the prisoner being visited. *See* Wash. Admin. Code § 275-80-900(1) (a visitor may not bring contraband into an institution). Visitors may attempt to smuggle drugs into a prison without the knowledge or consent of the inmate. It is irrelevant that the infraction charge against Mendoza was eventually dismissed. The visitation privileges were suspended because of Mrs. Mendoza's actions. She is not a party in this action, and Mendoza does not have standing to assert her rights. *See Powers v. Ohio*, ___ U.S. ___, 111 S. Ct. 1364, 1370-71 (1991) (litigants generally cannot rest a claim to relief premised on the rights of third parties).

AFFIRMED.[7]

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[7] The plaintiff-appellant/cross-appellee was well represented in this appeal by Kristin Bjorkman and Thomas G. Myrum, legal interns at the University of Idaho College of Law.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-35303
D.C. NO. C-89-770-JBH

ROGACIANO GONZALES MENDOZA,

Plaintiff-Appellant,

v.

JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,

Defendants-Appellees.

NO. 91-35305
D.C. NO. C-89-770-JBH

ORDER AND AMENDED OPINION

ROGACIANO GONZALES MENDOZA,

Plaintiff-Appellee,

v.

JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Washington
James B. Hovis, Magistrate, Presiding

Argued and Submitted
February 4, 1992--Seattle, Washington

Filed April 28, 1992

Before: Procter Hug, Jr., John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that a state prisoner had a state-created liberty interest under the prison's dry cell policy which gave him the right to procedural due process and that although the prison officials violated this right, they were entitled to qualified immunity.

Appellant Rogaciano Gonzales Mendoza, an inmate at a state prison, filed a Section 1983 complaint against the prison officials alleging that he possessed a liberty interest, requiring prison officials to follow the procedures outlined in the former dry cell watch regulation, as well as those set forth in Washington Administrative Code sections involving administrative segregation. While Mendoza was being visited by his wife and children, prison officials discovered on the floor of the visiting area a balloon thought to contain contraband. Mendoza was placed on a dry cell watch for the purpose of inspecting bowel movements for contraband. Although no contraband was found, a hearing was subsequently held on the infraction charge. Mendoza was found guilty of attempting to smuggle contraband into the prison but, subsequently, the infraction was dismissed. Notwithstanding the dismissal of the infraction, Mendoza's visitation rights with his wife and children were suspended for 90 days. The district court granted summary judgment for the prison officials and against Mendoza's attempt to vindicate his asserted rights to procedural due process under the dry cell policy and the visitation regulations.

[1] A state creates a protected liberty interest when it places substantive limitations on official discretion by adopting regulations that establish "substantive predicates" to govern official decisionmaking and mandating the outcome to be reached upon a finding that the relevant criteria have been met. [2] The regulations also must contain explicitly mandatory language. [3] As such, the prison's former dry cell watch regulation created a liberty interest.

A prisoner could be put upon such a watch only upon determination that there is reasonable suspicion that he is currently secreting contraband. [4] The duration of the watch was also subject to particularized criteria. As such, the prison officials had no discretion to fail to follow dry cell watch procedures. [5] The court did not need to decide whether the Washington State Administrative regulations governing the placement of prisoners in administrative detention created a liberty interest because[6] they were aimed at long-term segregation when the inmate posed a threat to the general prison population, himself, or the institution. [7] However, the after-the-watch hearing in this case was insufficient to accord Mendoza due process. The prison's failure to provide this minimum level of due process violates the procedural due process rights of an inmate placed on the dry cell watch. [8] However, because the impropriety of the prison officials' conduct was not clearly established before this case, they were entitled to qualified immunity.

[9] Having determined that the prison visitation regulations created a liberty interest, the court concluded that Mendoza's private interest in uninterrupted visits from his wife and children was relatively minor in this case to violate due process. [10] The visitation privileges had been suspended because of Mrs. Mendoza's actions and previous attempts at smuggling contraband into the prison. Not being a party to this action, her husband did not have standing to assert her rights.

COUNSEL

E. Christina Beusch, Assistant Attorney General, Olympia, Washington, for the defendants-appellees-appellants.

Kristin Bjorkman and Thomas G. Myrum, Legal Interns, supervised by Maureen Laflin, University of Idaho Law School, Moscow, Idaho, for the plaintiff-appellant-appellee.

ORDER

The opinion filed April 1, 1992 is amended as follows:

1. At page 3350 of the slip opinion, the second sentence of the first paragraph is amended to read: "Nor is there any preexisting law which would have indicated any apparent unlawfulness of the failure, during the watch, to provide a prisoner placed on such a watch with notice of the reason for that action, an opportunity to respond, and consideration of the response."

2. At page 3353 of the slip opinion, the last sentence of the first paragraph is amended to read: "A written notice of the decision shall be given to the inmate and to the visitor."

3. At page 3353 of the slip opinion, the third sentence of the final paragraph is amended to read: "The infraction was subsequently dismissed, but the suspension of Mendoza's visitation privileges with his wife and children was continued for the 90 day period."

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

Rogaciano Gonzales Mendoza, an inmate at the Washington State Penitentiary at Walla Walla ("the prison") filed a civil rights action pursuant to 42 U.S.C. § 1983. Mendoza alleges that the defendants, administrators and correctional officers at the prison, deprived him of procedural due process under the fourteenth amendment in the implementation of the prison's "dry cell" policy[1] and the prison's and state's visitation policy. The district court[2] granted summary judgment for the defendants. Mendoza appeals the district court's determination that the defendants are entitled to qualified immunity;[3] the defendants cross-appeal the district court's determination that Mendoza had a protected liberty interest under the prison's dry cell policy and under visitation regulations promulgated by the prison and the state.

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[1] We use the term "dry cell" policy interchangeably with the term "feces watch" policy.

[2] The parties agreed that a magistrate would decide the cross-motions for summary judgment.

We have jurisdiction under 28 U.S.C. § 1291 and we affirm. We hold that Mendoza had a state-created liberty interest under the prison's dry cell policy which gave him a right to procedural due process. The defendants violated this right, but they are entitled to qualified immunity.

We also hold that Mendoza had a state-created liberty interest which entitled him to procedural due process under the prison's and the state's visitation regulations; the defendants did not violate this right.

FACTS AND PROCEDURE

On September 29, 1989, Mendoza was visited by his wife ("Mrs. Mendoza") and six children in the visiting room of the prison. Correctional officers monitored the visit. Mendoza's children requested use of the restroom. A correctional officer unlocked the door and prepared to lead the children to the restroom. She noticed on the floor a balloon covered with a white slimy substance and the tip bitten off. No other prisoners or visitors had been in the area.

The officer informed her supervisor, who in turn contacted Associate Superintendent Lambert. According to the defendants, Lambert knew from his years of experience that balloons commonly were used to smuggle drugs into the institution. Lambert claimed he had a reasonable belief that Mendoza had ingested a balloon or balloons filled with narcotics.

Mendoza was charged with an infraction of prison rules and placed on a dry cell watch. Under this procedure, an inmate is placed in a custody-locked cell for the purpose of maintaining and inspecting at least three consecutive normal bowel movements for contraband. According to the dry cell procedure in place at the time of the incident, "[f]eces watches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate." Former Institutional Order (I.O.) 09.053.[4] "Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first." *Id.*

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[3] Mendoza's complaint also alleged that the implementation of the dry cell policy violated his first, fourth, eighth and ninth amendment rights. The district court dismissed these claims, and Mendoza has not appealed their dismissal.

Mendoza's dry cell watch began at 8:40 p.m. on September 29, 1989. He was placed in a hospital cell, strip-searched and given a clean pair of shorts. He slept on a mattress on the floor without a blanket, conforming with the dry cell watch requirement that the hands of a prisoner be visible at all times. Mendoza was held in the cell for 24 hours. During that time he was fed three meals and he defecated five times. The prison authorities found no contraband.

Mendoza was released from the watch at 8:41 p.m. on September 30, 1989. Within five days thereafter, a hearing was held on the infraction charge. Mendoza was found guilty of attempting to smuggle illegal contraband into the institution. However, on November 3, Superintendent Blodgett conducted his own investigation and determined that although the corrections officers had reasonable suspicion to place Mendoza on the dry cell watch, there was insufficient evidence on Mendoza's direct involvement in smuggling, and the infraction was dismissed.

Notwithstanding the dismissal of the infraction charge, Mendoza's visitation privileges with his wife and children were suspended for 90 days. In a letter to Mrs. Mendoza, Blodgett stated that "[d]ue to your history of attempting to introduce contraband into this institution by way of your children, I have no recourse but to believe this was again your intention."

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[4] A new procedure, "Dry Cell Search Procedure," WSP 420.311, has been in effect since March 7, 1990. The new procedure is considerably more lenient than the one in effect at the time of this incident; inmates may receive personal mail, file emergency court papers, wear a religious medallion and wedding ring, have one paperback book, magazine, or paper and pencil, use a blanket, and make emergency telephone calls. WSP 420.311(VII)F.2. The new procedure has mooted Mendoza's claim for injunctive relief.

The district court granted summary judgment, dismissing Mendoza's civil rights action in which he sought to vindicate his asserted rights to procedural due process under the dry cell policy and under the visitation regulations. This appeal followed.

DISCUSSION

A. Standard of Review

We review a district court's grant of summary judgment *de novo*. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

B. Liberty Interest Created by the Dry Cell Watch Procedure

1. State-Created Liberty Interests

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend XIV, § 1. Mendoza argues that he possesses a liberty interest, requiring prison officials to follow the procedures outlined in the former dry cell watch regulation, as well as those set forth in Washington Administrative Code sections involving administrative segregation.

A liberty interest may arise from either of two sources: the due process clause or state law. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Toussiant v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Mendoza does not argue that the due process clause itself provides him the liberty interest he contends was abridged. Rather, he argues the Washington Administrative Code and the former dry cell watch regulation created that liberty interest.

[1] A state creates a protected liberty interest when it places substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). The most common way a state creates such an interest is by adopting regulations which establish "substantive predicates" to govern official decisionmaking and by mandating the outcome to be reached upon a finding that the relevant criteria have been met. *Id.* There must be particularized standards or criteria to guide the state's decisionmakers, and the criteria must serve to limit discretion. *Id.* If a decisionmaker can make his decision for any constitutionally permissible reason or for no reason at all, the state has not created a liberty interest. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

[2] The regulations also must contain "'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Kentucky Dep't of Corrections*, 490 U.S. at 463 (citing *Hewitt*, 459 U.S. at 471-72). Although a search for mandatory language necessarily focuses on words such as "shall" and "will," mere use of these words is insufficient. *Toussiant*, 801 F.2d at 1098. Rather, the search is for "*relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." *Kentucky Dep't of Corrections*, 490 U.S. at 464 n.4 (emphasis on original).

2. Former Dry Cell Watch Procedure

[3] The prison's former dry cell watch regulation creates a liberty interest. It provides particularized standards and criteria. A prisoner can "be placed upon Feces Watch *only upon determination* that there is reasonable suspicion

that [he] is currently secreting contraband." Former I.O. 09.053 (emphasis added). Reasonable suspicion

> [s]hall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

Id.

[4] The duration of the watch is also subject to particularized criteria. "Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first." *Id.* The regulation allows 24-hour extensions by the superintendent or his designee "where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period," in cases where "there is specific and reliable information" the subject of the search is "secreting contraband on his person by means of a method which would prevent it from being passed after three normal bowel movements, or the equivalent thereof," or "in the event of no bowel movements or re-ingesting the contraband." *Id.*

The regulation contains "explicitly mandatory language." *See Hewitt*, 459 U.S. at 472. The decisionmaker must decide whether to place a prisoner on a dry cell watch by determining if reasonable suspicion exists. Further, the decisionmaker may extend the duration of the watch only under the conditions outlined in the regulation.

The defendants mistakenly focus upon the question whether the superintendent has discretion *not* to place a prisoner on a dry cell watch even though he may have reasonable suspicion that the prisoner has secreted contraband. The relevant question is whether the superintendent has discretion to *fail* to follow dry cell watch procedures once he determines to place a prisoner on a watch. The substantive predicates and explicitly mandatory language indicate he has no such discretion. The regulation creates a protected liberty interest.

3. Administrative Segregation Regulations

[5] Mendoza also argues that the Washington state administrative regulations governing the placement of prisoners in administrative detention, Washington Administrative Code ch. 137-32, create a liberty interest. We need not reach this issue, because these regulations are inapplicable to the dry cell watch procedure at issue here.

[6] The Washington state administrative segregation regulations are aimed at long-term segregation when the presence of the inmate in the general population poses a serious threat to the inmate or others or the orderly operation of the institution. *See* Wash. Admin. Code § 137-32-005. They are not aimed at confiscating contraband. We agree with the district court that "the State of Washington did not intend [these] administrative segregation provisions to apply to the dry cell watch. Indeed, it would be unreasonable to require all of [such] procedures in the relatively short span of a dry cell watch."

C. What Process is Due?

The Supreme Court in *Hewitt* described the very limited procedural protections afforded prisoners.

> The requirements imposed by the [due process] Clause are, of course, flexible and variable dependent upon the particular situation being examined. In determining what is "due process" in the prison context, we are reminded that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison." "Prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."

Hewitt, 459 U.S. at 472 (citations omitted).

Hewitt concerned the placement of an inmate in administrative segregation. The Court held that an informal, nonadversary evidentiary review is sufficient "both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him." *Id.* at 476. An inmate has the right to notice and the right to be heard. An informal proceeding "must occur within a reasonable time" following the inmate's placement in administrative segregation, taking into account "the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials." *Id.* at 476 n.8. In *Hewitt*, prison officials satisfied due process through a hearing "[o]nly five days" after the inmate's transfer to administrative segregation. *Id.* at 477.

Having determined that the state has created a liberty interest by its dry cell watch regulation, we must decide whether the process afforded Mendoza satisfied the minimum requirements of procedural due process under the fourteenth amendment. To determine this question, we consider Mendoza's private interests, the governmental interests, and the value of the procedural requirements. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Mendoza's private interests were substantially affected by the dry cell watch. The watch procedures in effect at the time were extremely unpleasant. Pursuant to those procedures, Mendoza was permitted to wear only shorts. He was confined in the cell on a mattress on the floor without a blanket.[5] He was not permitted to shower, although he was provided a wash cloth, a face towel, a bar of soap, toothbrush and tooth powder, and a wash basin at specified times. He was subjected to a continuous watch by a prison guard. He had to keep his hands in sight at all times, and his feces and urine were meticulously examined.

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[5] A thermometer was located at the front of Mendoza's cell. The temperature ranged between 78-82 degrees during the course of the watch. The prison regulation required that the cell temperature be at least 68 degrees Fahrenheit.

The prison officials' interests were triggered by Mendoza's suspected involvement in smuggling contraband into the prison. Prompt action was required. Illicit drugs smuggled into a prison create discipline problems, lead to further crime, and increase health dangers to inmates. The officials' response to this threat by implementing the dry cell watch policy was justified. Mendoza does not dispute this. Rather, he challenges the constitutionality of the procedures afforded a prisoner placed on the dry cell watch. We turn now to a consideration of this question.

Mendoza received a hearing within five days after the end of his placement on the watch. By this time, however, Mendoza had suffered all the indignities the watch demands.

[7] Such an after-the-watch hearing in this context is insufficient to accord the prisoner due process. The prisoner is entitled to notice of the reason for being placed on the watch, and an opportunity to respond in writing, within a reasonable time after the commencement of the watch. No formal hearing is required, but the prisoner's response must be given some consideration. The failure to provide this minimum level of due process violates the procedural due process rights of an inmate placed on the dry cell watch. Accordingly, we hold Mendoza's rights to procedural due process were violated.[6]

D. Qualified Immunity

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[6] Mendoza also argues that the prison violated its own former dry cell policy when it continued the watch after Mendoza completed his third bowel movement. We disagree. The former dry cell watch procedure stated that the search "shall normally" be concluded within 84 hours of a prisoner's placement on watch, or after the equivalent of three normal bowel movements, whichever occurs first. Former I.O. 09.053. Mendoza had his third bowel movement at 10:56 a.m., but was held an additional nine hours and after two more bowel movements.

As a general rule, an official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court must "identify the applicable law and determine whether that law was 'clearly established' at the time the defendants acted." *Alexander v. Perrill*, 916 F.2d 1392, 196 (9th Cir. 1990). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court explained that the

> contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citation omitted).

No case, before the present one, has been cited to us, nor have we found any, in which a court has considered what process is due an inmate placed on a dry cell watch. Nor is there any preexisting law which would have indicated any apparent unlawfulness of the failure, during the watch, to provide a prisoner placed on such a watch with notice of the reason for that action, an opportunity to respond, and consideration of the response.

[8] This absence of decisional law or regulatory requirement is probative of the question whether a right is clearly established. *Alexander v. Perrill*, 916 F.2d at 1398. Following *Hewitt*, the defendants reasonably could have believed that a post-watch hearing met constitutional requirements. Because the impropriety of the defendants' conduct

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The "shall normally" language gave prison official some leeway to hold a prisoner for more than three bowel movements if within the 84 hour period. It is only in cases where the inmate "has not had the equivalent of three normal bowel movements within the 84 hour period" that the superintendent must authorize further 24 hour extensions. *Id.*

was not clearly established before this case, the defendants are entitled to qualified immunity.

E. Liberty Interest Created by Visitation Regulations

Mendoza argues that Washington state administrative rules, and prison regulations, concerning visitation policy create a liberty interest protected by the fourteenth amendment. He contends the defendants violated this interest by suspending his wife's and children's visitation for 90 days.

As with the dry cell watch policy, a state created liberty interest exists only when the regulations contain substantive predicates and explicitly mandatory language. In *Kentucky Dep't of Corrections*, 490 U.S. 454, the Supreme Court considered whether Kentucky prison regulations created a liberty interest in receiving visitors. The regulation stated in part that "[a]lthough administrative staff reserves the right to allow or disallow visits, it is the policy of the Kentucky State Reformatory to respect the right of inmates to have visits in the spirit of the Court decisions and the Consent Decree, while insuring the safety and security of the institution." *Id.* at 457. It also contained a nonexhaustive list of nine specific reasons for excluding visitors. *Id.*

The Court stated that these regulations provided certain "substantive predicates" to guide the decisionmaker, such as the statement that visitors could be excluded when officials found reasonable grounds to believe that the "visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with [its] orderly operation." *Id.* at 463. However, the Court went on to hold that the regulations did not contain sufficient explicit mandatory language to create a protected liberty interest. "The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions." *Id.* at 464-65.

The present case is distinguishable from *Kentucky Dep't of Corrections*. Here, we focus upon the procedures for suspension and termination of visitation rights, and not on

Washington or prison visitation policy in general, because this is the language *relevant* to the prison official's decision to exclude Mrs. Mendoza. *See id.* at 464 n.4 (focus must be upon *relevant* mandatory language).

The prison's Institutional Order 16.120(VI)C provides in pertinent part that

> 1. A visit may be denied or terminated and visiting privileges suspended under the following circumstances:
>
> > . . .
> >
> > e. Violation of institutional visiting rules by visitor.
> >
> > . . .
> >
> > h. Other reasons for denying, terminating, or suspending a visit as reasonably necessary to reserve the security of the institution and reasonable order in the Visiting Area.
> >
> > . . .
>
> 2. Based upon information provided by staff, the inmate and/or visitor, the the [sic] Superintendent or his designee may remove an individual's name from an Approved Visiting List for a specified period, indefinitely or permanently. A written notice of the decision shall be given to the inmate and to the visitor. The statement of reasons may be deleted or limited in details.
>
> . . .
>
> 4. Visiting privileges shall be denied only by orders from the Superintendent or his designee. When the suspension is imposed as part of a formal disciplinary proceeding, the Superintendent or his designee will have final approval. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting.) A visitor who has had his/her visiting privileges sus-

> pended may submit written statements in opposition to the suspension.
>
> . . .

In addition to this institutional order, Washington Administrative Code § 275-80-930 provides that the visiting rights of a prisoner may be suspended

> only after a finding of guilt pursuant to a regular disciplinary hearing and such rights may be abridged for a maximum duration of 90 days after which visiting rights shall be restored unless there remains a clear and present, or imminent danger to the health and safety of any visitor, resident or staff member.

These regulations contain the "substantive predicates" necessary to the creation of a liberty interest. Visiting rights may be suspended "only after a finding of guilt pursuant to a regular disciplinary hearing." Visiting privileges may be denied under an enumerated list of circumstances. "A written notice of the decision shall be given to the inmate and the visitor."

Unlike the prison regulations in *Kentucky Dep't of Corrections*, the regulations in this case contain explicit mandatory language. Prison officials may suspend visiting privileges *only* after a finding of guilt. Written notice *shall* be given. The regulations do not provide that the administrative staff "reserves the right" to allow or disallow visits. Thus, an inmate may reasonably form an objective expectation that visiting privileges will not be suspended without compliance with the applicable rules. *Cf. Kentucky Dep't of Corrections*, 490 U.S. at 464-65.

F. What Process is Due?

To determine what process is due, it is necessary once again to turn to the factors set out in *Mathews v. Eldridge*.

[9] Mendoza's private interest in uninterrupted visits from his wife and children is relatively minor in this case. The suspension was limited to 90 days. It did not affect Mendoza's rights to parole, good time credits, or privileges

in the prison. Prison officials, on the other hand, have a strong interest in preventing visitors from smuggling drugs into the prison.

Finally, Mendoza was given an informal infraction hearing. He was initially found guilty of attempting to smuggle contraband into the prison, and his visitation privileges with his wife and children were suspended for 90 days. The infraction was subsequently dismissed, but the suspension of Mendoza's visitation privileges with his wife and children was continued for the 90-day period. These visitation privileges were not reinstated because of the circumstances under which the balloon had been discovered, and Mrs. Mendoza's prior conduct. The Mendoza children had been the only people in the area where the balloon was found, and Mrs. Mendoza had tried to smuggle contraband to her husband in the prison on prior occasions.

Mendoza argues that when the defendants refused to reinstate his visitation privileges after the infraction charge against him had been dismissed, they violated Washington Administrative Code § 275-80-930. He contends that under this code section his visitation rights could be suspended "only after a finding of guilt pursuant to a regular disciplinary hearing." He argues he was cleared of the charges, and thus the visitation rights should have been reinstated. We reject this argument.

[10] Prison officials have the right to suspend the visiting privileges of a *visitor* who attempts to smuggle drugs into the prison regardless of the guilt or innocence of the prisoner being visited. *See* Wash. Admin. Code § 275-80-900(1) (a visitor may not bring contraband into an institution). Visitors may attempt to smuggle drugs into a prison without the knowledge or consent of the inmate. It is irrelevant that the infraction charge against Mendoza was eventually dismissed. The visitation privileges were suspended because of Mrs. Mendoza's actions. She is not a party in this action, and Mendoza does not have standing to assert her rights. *See Powers v. Ohio,* ___ U.S. ___, 111 S. Ct. 1364,

1370-71 (1991) (litigants generally cannot rest a claim to relief premised on the rights of third parties).

AFFIRMED.[7]

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[7] The plaintiff-appellant/cross-appellee was well represented in this appeal by Kristin Bjorkman and Thomas G. Myrum, legal interns at the University of Idaho College of Law.

[FILED
JUNE 1, 1992]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-35303
D.C. NO. C-89-770-JBH

ROGACIANO GONZALES MENDOZA,

Plaintiff-Appellant,

v.

JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,

Defendants-Appellees.

NO. 91-35305
D.C. NO. C-89-770-JBH

ORDER

ROGACIANO GONZALES MENDOZA,

Plaintiff-Appellee,

v.

JAMES BLODGETT; LT. GARY EDWARDS;
EDITH JONES; RON VAN BOENING;
JACK LAMBERT; LAWRENCE KINCHELOE,

Defendants-Appellants.

Before: HUG, NOONON and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX F

INSTITUTIONAL ORDER 16.020
INSTITUTIONAL POLICY AND PROCEDURES

CHAPTER
COMMUNICATION, MAIL AND VISITING

SUBJECT
INMATE VISITING

I. *AUTHORITY*: Policy Directive 420.100.

SCOPE: Each visiting location at Washington State Penitentiary will have a Procedure Manual detailing visiting within their location.

II. *PURPOSE*: To set forth a policy and establish regulatory procedures for administering the visiting program and to provide an effective visiting program that will enhance rehabilitative efforts, establish a normalization of social relationships, and satisfy security requirements of this facility.

III. *APPLICABILITY*: To all inmates and personnel of the institution, and especially to the appropriate Associate Superintendent, and Visiting Room Staff.

III. *DEFINITIONS*:

A. *Container Search*: An inspection of items brought into a facility by visitors including, but not limited to a search of briefcases, handbags, lunch boxes, envelopes and other items. Such searches may be conducted absent any reasonable suspicion or on a *random basis*.

B. *Contraband*: For purpose of this policy, contraband is defined as any unauthorized item which a correctional facility prohibits from possession by offenders on institution grounds or within the secure perimeter of the facility and any unauthorized item which may not be legally possessed by a visitor or offender on the grounds or within the perimeter of a correctional facility including, but not limited to any explosive, any deadly weapon as defined by RCW 9.94.043, any drug as defined by RCW 9.94.045, any controlled substance as defined in Chapter 69.50 RCW, and any alcoholic beverage.

C. *Electronic Search*: A scan of the personal effects and the clothed body of an individual by use of a hand-held or stationary metal detector or electronic viewing device.

D. *Locker Search*: Lockers are the property of the Department of Corrections, which may be made available for the convenience of visitors. The facility shall maintain a key for all lockers and may inspect them absent any reasonable suspicion or on a *random basis*.

E. *Pat Search*: Patting the hands down the clothed body of a visitor. Such searches may be conducted absent any reasonable suspicion on a *random basis*.

F. *Reasonable Suspicion*: A reasonable suspicion is one based on specific objective information along with all the rational inferences the authorizing official is entitled to draw from the information, in light of that official's experience, that the visitor may possess contraband. Some factors which can be considered in determining reasonable suspicion include:

1. The nature of the tip or information
2. The reliability of the informant
3. The degree of corroboration
4. The response of the search dogs
5. Other facts contributing to suspicion or lack thereof, such as contraband discovered or other pertinent information revealed by a pat, electronic, strip or other search.

G. *Strip Search*: A search of all of a visitor's clothing and the visual examination of the visitor's naked body, including the mouth and areas between the fingers and toes and under the armpits and soles of the feet. Such searches may be conducted only on *reasonable suspicion* to believe a visitor possesses contraband on his or her person.

H. *Vehicle Search*: An inspection of any vehicle entering the grounds or perimeter of a correctional facility including, but not limited to looking under the hood, under seats, into glove boxes, into the trunk and a container search of all items transported in the vehicle. Such searches may be conducted without reasonable suspicion the visitor is transporting contraband and on a *random basis*.

I. *Visitor*: For purposes of this policy a visitor is defined as any person who enters the grounds or perimeter of a correctional facility who is not a correctional employee as defined in Policy Directive 420.120.

J. *Use of Canines*: All searches which can be conducted on a random basis may be aided by trained dogs only with authorization of the Superintendent or his designee.

V. *POLICY*:

A. This Policy will be reviewed with inmates during orientation. A copy of the document will be made available or posted in the following areas: Visiting Room, Information Desk, Inmate Library and Inmate Living Units.

B. The number of visitors an inmate may receive and the length of visits shall be limited only by the institution's schedule, space and personnel requirements. Inmates shall not be denied visitation with persons of their choice except:

1. Persons associated with him in the commission of the offense for which he was incarcerated.

2. Minor children who are identified as victims of sexual molestation by the inmate.

3. Parolees and probationers under supervision unless authorized by the Superintendent or his designee.

4. Ex-offenders unless authorized by the Superintendent or his designee.

5. Persons under 18 years of age may not participate as a member of a group visiting within the security perimeter of the institution.

C. This institution shall provide a visiting room for inmates and their guests that allow ease and informality of communication in a natural environment. It shall be arranged with the comfort and privacy of the visitor in mind, and to allow for socially acceptable physical contact during visiting.

VI. *PROCEDURES*:

A. *List of approved Visitors*

1. Each inmate shall submit to his Unit Counselor, a list of names and addresses of proposed visitors. Staff shall approve persons for an inmate's Visiting List in accordance with the following guidelines:

a. List of approved visitors (only visitors who have completed the attached questionnaire and have been approved for visiting). (Schedule B)

b. All persons under the age of 18 or over the age of 16 may be placed on an inmate's Visiting List by submitting a notarized signature from the legal guardian on the original Visiting Questionnaire.

c. All inmates are allowed ten (10) persons on the Visiting List (married couples, Mr. and Mrs. *will not* be counted as one visitor).

d. Parolees and Probationers (not under supervision) unless authorized by the Superintendent or his designee.

e. All children must be accompanied by their parent or legal guardian. Any exceptions must be arranged through the inmate's Counselor.

f. Visitors may only be on one Approved Visiting List at a time, except as provided in Section VI, Paragraph C, 5., b.

2. The inmate shall be given a copy of his Approved Visitors List upon request to his assigned Counselor.

3. When an individual is not approved, notice of, and reasons for the exclusion shall be given to the inmate who submitted the individual's name. The inmate may appeal the decision to the Superintendent or his designee.

4. Attorneys shall schedule visits to their clients at least 24 hours in advance, and will be admitted to the institution during regular working hours after presenting proper credentials and identification. They should be registered into the institution and be subject to search procedures and all other rules and regulations of the institution.

a. Attorney Provided Information:
   1. The Attorney's or Legal Aides' name
   2. Date and time of interview
   3. Inmate's name and DOC number
   4. Inmate's housing assignment

b. All conversations between inmates and attorneys may be visually observed by supervising officers, but not overheard, recorded or listened to in any manner. All reasonable precautions shall be taken to preserve the confidentiality of the attorney/client relationship.

5. If a Special Visit is approved for inmates in Disciplinary Status, the visit shall be held in the No Contact Visiting Area.

6. Visits for inmates in the Hospital and/or medical isolation shall require the approval of the Health Care Manager. Depending upon the seriousness of the illness, visits for hospitalized inmates may be held in either the Hospital or the Visiting Area. If the inmate is able to walk to the Visiting Room, the visit will take place with population. Visits to inmates confined to the Medical Isolation Unit shall be conducted in the Hospital.

7. Visits for inmates confined to public (downtown) hospitals are not permitted, except by order of the Superintendent or his designee. Such visits shall be authorized only when the inmate's medical condition is deemed to be life threatening and shall be conducted under heavily supervised security conditions.

B. *Frequency of Visits*: Visits for the inmate population assigned to the Main Institution are rotated according to Units, Wednesday through Sunday, allowing for visits every third day for each Unit.

Visiting days and hours for the Medium Security Unit and Intensive Management Unit will be governed by the visiting procedures outlined in the Operational Procedural Manuals of those Units.

C. *Termination & Suspension of Visits*:

1. A visit may be denied or terminated and visiting privileges suspended under the following circumstances:

a. Visitors under the influence of drugs or alcohol.

b. Insufficient space available.

c. Refusal of visitor to submit to search procedures.

d. Refusal or failure to produce sufficient identification or the falsifying of identifying information by visitor.

e. Violation of institutional visiting rules by visitor.

f. Failure to prevent children from disturbing other persons in the Visiting Area.

g. Excessive physical contact or sexual activity by the visitor or inmate. On Contact Visits, an inmate and visitor may embrace or kiss briefly at the beginning and end of the visit. An inmate and visitor may hold hands during the remainder of the visit. These contact restrictions shall not apply to small children.

h. Other reasons for denying, terminating or suspending a visit as reasonably necessary to preserve the security of the institution and reasonable order in the Visiting Area.

i. Abusive language to staff and other visitors.

j. Any behavior that is offensive or disruptive.

2. Based on the information provided by staff, the inmate and/or visitor, the the Superintendent or his designee may remove an individual's name from an Approved Visiting List for a specified period, indefinitely or permanently. A written notice of the decision shall be given to the inmate and to the visitor. The statement of reasons may be deleted or limited in details.

3. A person shall not be denied permission to visit solely because of sex, marital status, status

as an ex-offender, or having visited another inmate.

4. Visiting privileges shall be denied only by orders from the Superintendent or his designee. When the suspension is imposed as part of a formal disciplinary proceeding, the Superintendent or his designee will have final approval. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting.) A visitor who has had his/her visiting privileges suspended may submit written statements in opposition to the suspension.

5. Visitors may be removed from one inmate's Visiting List and placed on another when adequate justification is shown. The visitor must complete a new set of Visiting Forms and it must include a statement of the reason for the change. If, for any reason, a visitor is removed from a Visiting List by the inmate, they cannot be authorized to return to that inmate's Visiting List for six (6) months from the effective date of removal.

   a. A visitor may apply no more than three times. Any request beyond the third time or any request not accompanied by adequate justification will be denied.

   b. When a visitor or prospective visitor has more than one inmate who are immediate family members, the visitor may be on each of the inmate's Visiting List. Immediate family is defined as and limited to parents, stepparents, brothers, sisters or stepbrothers or sisters, children, stepchildren, grandparents. In this case, each inmate must complete and mail a separate Visiting Questionnaire to his immediate family.

   c. In an indefinite suspension, the notice shall include a date when reapplication for visiting privileges may be made on behalf of the visitor.

D. *Special Visits*: Special Visits may be granted on a onetime basis where there is a special need which cannot be satisfied through normal procedures.

1. Special Visits by persons *not on the Approved Visiting List*, including prospective employers, sponsors, parole advisors or immediate family members traveling a long distance, shall be authorized by the inmate's Counselor, Correctional Unit Supervisor and Correctional Program Manager. These persons may be able to offer valuable assistance to inmates and shall be allowed to visit *whenever* possible.

2. Special Visit requests by persons *on the Approved Visiting List must* meet the following criteria:

   a. They should not have visited within the last six months prior to the request of the visit.

   b. The visitor should be coming from a distance of at least 300 miles. This does not mean a Special Visit will be based on distance alone. There must be a specific need related to the visit which cannot be satisfied on a normal visiting day for that Unit.

   c. A local visit must be able to demonstrate significant and verifiable need. Normally, a local visitor will not be approved for a Special Visit.

   d. Any Special Visits in conjunnction with regular visiting days shall not be approved automatically. There should be no population visits approved on Protective Custody days.

e. Any Speial Visit requested for a *non-visiting day* must be approved by a Correctional Program Manger, Captain, Duty Officer or higher.

f. Special Visit Request Forms will be approved or denied by the Counselor, Correctional Unit Supervisor and Correctional Program Manager, and delivered to the Information Desk Officer (Regular Visiting Days.)

g. At the Medium Security Complex, all Special Visits must be approved by the Correctional Program Manager.

E. *Special Review / Consideration of Visiting*: Any inmate or visitor may submit a letter of special consideration for review of visitation rights for any situation *not* covered in this policy. Such letter should be submitted to the Superintendent or his designee.

VII. *REVIEW*:

A. This order shall be reviewed annually by the Superintendent or his designee.

B. If there are modifications or changes, they will be forwarded to the Deputy Director for review and approval.

APPROVED: this 18th day of May, 1988.

/s/ Larry Kincheloe JS
Superintendent,
Washington State Penitentiary

APPENDIX G

INSTITUTIONAL ORDER 09.053

INSTITUTIONAL POLICY AND PROCEDURES

CHAPTER
SECURITY & CONTROL

SUBJECT
FECES WATCH PROCEDURE

I. *AUTHORITY*: RCW 69.50, RCW 9.94.049, RCW 9.94.041; DOC 421.110.

II. *PURPOSE*: Feces watches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate. Approval for a Feces Watch must be obtained from the Superintendent or his designee with the rank of Captain or above.

III. *APPLICABILITY*: To all staff and especially to those Correctional Supervisors and employees who are involved in the search of inmates housed at the Washington State Penitentiary.

IV. *DEFINITIONS*:

Feces Watch: The placement of an inmate in a custody-locked cell, for the purpose of maintaining and inspecting at least (3) three consecutive normal bowel movements for contraband.

Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

V. *POLICY*: An inmate will be placed upon Feces Watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband. In cases where an inmate informant supplies information upon which "Reasonable Suspicion" is based, the past reliability or unreliability of the inmate informant shall be considered as well as the specificity of the information provided and whether the inmate has any advantage to be gained from providing the information. Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, which ever occurs first. In cases where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period, 24-hour extensions may be authorized by the Superintendent or his designee with the rank of Captain or above until the inmate has had the equivalent of three normal bowel movements. In cases where there is specific and reliable information if the subject of the search is secreting contraband on his person by means of a method which would prevent the contraband from being passed after three normal bowel movements, or the equivalent thereof, then 24-hour extensions up to seven days from the beginning of the initial placement on Feces Watch may occur upon the authorization of the Superintendent ONLY. (Attachment A) In the event of no bowel movements or re-ingesting the contraband and the time limit may excede 7 days, the Director of Prisons may authorize 24-hour extensions as needed.

VI. *PROCEDURE*: To outline procedures which will enable staff at the Washington State Penitentiary to effectively monitor, recover and process contraband believed to be carried internally by an inmate.

A. Escort inmate to the Hospital from the place of the incident.

1. The inmate will be escorted in handcuffs by two (2) Correctional Officers to a custody locked cell in the Hospital, or to surgery if a body cavity search is required (follow procedures in I.O. 09.052). One officer will maintain control of the inmate, while the other officer walks behind the inmate. If the inmate is suspected of having placed the contraband in his rectum, particular attention should be given to the possibility of him excreting it down his pant leg. The inmate's pant legs are to be tightly taped so no contraband can be lost.

2. Upon arrival in the custody locked cell, the handcuffs will be removed and one officer will strip search the inmate. The Shift Lieutenant/ Sergeant *will* check the condition of the cell and mattress prior to occupancy and so *indicate* in the log. The second officer will place all of the inmate's clothing, except his shorts, in a plastic bag, attach an inventory slip provided by the Hospital and secure it in a place designated by Hospital staff.

3. Prior to placement, an inmate's medical record should be consulted for modalities. If present, medical staff should be consulted for need during the watch period. This *will be* documented in the log.

B. Officer and medical staff instructions for inmates placed on feces watch.

1. The Feces Watch Officer will be relieved at 4-hour intervals. The Shift Lieutenant/Shift Sergeant are to make at least one round during each officer's watch. The Feces Watch Officer will be provided with verbal instructions and a folder by the Shift Lieutenant which will contain the following:

a. I.O. 09.053 - Feces Watch Procedure

b. I.O. 09.052 - Body Cavity Search Procedures

c. I.O. 09.150 - Contraband Management

d. Two (2) evidence bags and four (4) evidence cards (more may be obtained if necessary)

e. Feces watch logs.

2. The cell is to be searched at least once per 8-hour shift. The Shift Sergeant is to assign the appropriate staff to accomplish this.

3. The cell temperature reading is to be taken twice a shift and recorded in the Shift and Feces Watch Log. The cell temperature shall be no lower than 68 degrees Fahrenheit, and may be higher. If the Shift Lieutenant/Sergeant believes an insulated top is warranted one will be issued. If the inmate abuses the privilege, the top will be recovered.

4. While the inmate is restrained, he will be exercised for 15 minutes ever four (4) hours. (This will be logged.)

5. A feces watch log will be completed by each feces watch officer. All blocks must be filled out completely. Information should include what the inmate says, if it could relate to the suspected contraband, how the inmate acts, what the inmate eats and drinks and the times, consistency and quantity of his bowel movements and urination.

6. *The water in the custody locked cell will be turned off during the period of the feces watch*. A bedpan and urinal will be provided when the inmate requests them. Feces will be thoroughly checked by the feces watch officer. If contraband is found, I.O. 09.150 - Contraband Management,

will be followed. However, the feces watch officer may NOT leave the cell to contact the Shift Lieutenant or process the evidence until *another officer* relieves him. The same rule applies when the officer has to leave the cell for any other reason during his shift.

7. Feces and urine will be disposed by *medical staff* by flushing them down a toilet, other than the one in the cell in which the feces watch is taking place.

8. normally the inmate will be attired in shorts only. A mattress on the floor is the only bedding provided. No sheets, pillows, pillow cases or blankets are to be provided.

9. The inmate is not allowed to have cigarettes, matches, mail, reading materials or any other personal articles.

10. No telephone calls or showers will be permitted.

11. At the following listed times each day the inmate will be provided access to the listed hygiene items:

   a. Access Period:
      1. 6:15 AM to 6:30 AM (Breakfast)
      2. 10:15 AM to 10:30 AM (Lunch)
      3. 3:30 PM to 3:45 PM (Dinner)
      4. After any bowel movement
   b. Hygiene Articles:
      1. One (1) Wash Cloth
      2. One (1) Face Towel
      3. One (1) Bar Soap
      4. One (1) Toothbrush and sufficient tooth powder to brush his teeth.
      5. One (1) Wash Basin

At the end of the allotted time, all hygiene articles will be returned to the medical staff. The Feces Watch Officer shall log the availability of these items and shall note whether or not the inmate used any or all of them.

11. The Feces Watch Officer is not to take his eyes off the inmate at any time. The inmate's hand(s) are to be kept in plain sight at all times.

12. Failure to follow this procedure will result in disciplinary action.

VI. *REVIEW*:

A. This Order will be reviewed annually by the Superintendent or his designee for update and/or any required modifications.

B. When there is any modification or change to this procedure, it will be sent for review and approval by the Deputy Director.

C. This Order will become effective immediately on date of Superintendent's signature.

APPROVED this 28th day of October, 1988.

/s/ Larry Kincheloe JS
Superintendent,
Washington State Penitentiary

APPENDIX H

WASHINGTON STATE PENITENTIARY (WSP) POLICY 420.311

TITLE
DRY CELL SEARCH PROCEDURE

I. *AUTHORITY*: RCW 69.50, RCW 9.94.049, RCW 9.94.041, DOC 421.110; DOP420.311

II. *PURPOSE*: Dry Cell Searches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate.

III. *APPLICABILITY*: To all staff and especially to those Correctional Supervisors and employees who are involved in the search of inmates housed at the Washington State Penitentiary.

IV. *DEFINITIONS*:

Dry Cell Search: The placement of an inmate in a secure room for the purpose of ensuring no contraband is concealed in the digestive tract or body cavity. Also, to ensure that any foreign substances or instruments in the body are safely passed from the inmate's body.

Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate in secreting contraband. Some factors which can be considered in determining reasonable suspicion include (a) the nature of the tip or information; (b) the reliability of the informant; (c) the degree of corroboration; (d) the response of search dogs; and (e) other facts contributing to suspicion or lack thereof, such as contraband discovered or other pertinent information revealed by pat, electronic, strip or other search.

V. *FIELD INSTRUCTION*: An inmate will be placed upon Dry Cell Searches only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband. Approval for a Dry Cell Search must be obtained from the Superintendent or the designate Duty Officer.

VI. *PROCEDURE*: The following procedures, restrictions and processes shall be adhered to when an inmate is placed on a dry cell search.

A. *Placement Determination*: A dry cell search shall only be authorized when the Superintendent/Duty Officer determines that reasonable suspicion exists that the inmate is secreting contraband on his person.

1. Before an inmate is placed on Dry Cell Search, an authorization on DOC Form 21-408) Dry Cell Search Authorization (Attachment A), must be completed. The form is to record specific evidence relied upon by the Superintendent/Duty Officer in determining the existence of reasonable suspicion.

2. Confidential Informant Considerations: where a known confidential informant supplies information upon which "reasonable suspicion" is based, the reliability informant and the information provided shall be assessed and documented in accordance with DOP Division Directive 490.300 (Confidential Informant Information).

B. *Duration of Dry Cell Search*: Dry Cell Search must be conclud~~ed within~~ 84 hours or after the equivalent of three normal bowel movements, whichever occurs first, unless:

1. In cases where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period, 24-hour extensions may be authorized by the Superintendent or his designee with the rank of Captain or above until

the inmate has had the equivalent of three normal bowel movements.

2. In cases where there is specific and reliable information if the subject of the search is secreting contraband on his person by means of a method which would prevent the contraband from being passed after three normal bowel movements, or the equivalent thereof, then 24-hour extensions up to seven days from the beginning of the initial placement of dry cell watch may occur upon the authorization of the Superintendent and Command Manager.

3. In the event that there is documented reasonable suspicion that an inmate has re-ingested or reinserted the contraband written authorization must be obtained from the Superintendent with concurrence of the Command Manager, for 24 hour extensions (DOC Form 21-408, Attachment A).

4. Even with the extensions noted above, the total time period on Dry Cell Search cannot exceed seven days without the specific written authorization of the Director, Division of Prisons.

C. *Termination of Dry Cell Search*:

1. A Dry Cell Search shall be terminated when one of the following occurs:

   a. all suspected contraband is recovered from the inmate; or

   b. the time periods noted in "Duration of Dry Cell Search" section above have lapsed; or

   c. the inmate has had three consecutive normal bowel movements.

D. *Procedures for Termination of the Dry Cell Search*:

1. The Shift Lieutenant is responsible to inform the Superintendent, via the chain of command, when the authorized time limits have expired and/ or the contraband has been retrieved.

2. The removal of an inmate from Dry Cell Search will be determined and authorized in writing by the Superintendent/Duty Officer.

E. *Pre-placement Procedure*: Before an inmate is placed on Dry Cell Search the following pre-placement procedures must be adhered to:

1. Voluntary Retrieval: The inmate will be given the opportunity to voluntarily retrieve the contraband/foreign object. This shall be documented in accordance with DOP420.310, Inmate Searches.

a. AFter the results of this step are known, the Superintendent shall evaluate, based on reasonable suspicion the need for a Dry Cell Search.

2. Medical Examination and Records Check:

a. Before placement on a Dry Cell Search the inmate will be examined by medical staff to ensure that placement on the Dry Cell Search will not be physically detrimental to the inmate. This examination will be conducted in the designated watch room unless conditions require it to be performed at another location.

1). If the examination occurs elsewhere, the Shift Lieutenant will ensure that close observation and control are maintained so that the contraband is not unknowingly lost.

b. If after review of the inmate's medical records or after the medical examination, it is the judgment of the medical staff that placement of the inmate on Dry Cell Search would be detrimental to the inmate's health, this will be reported in writing to the Superintendent, who MAY revoke the order to have the inmate placed on Dry Cell Search, or with consultation with medical staff, place the inmate on a Dry Cell Search with precautions to ensure that the inmate's health will not be adversely affected.

c. After the inmate's health records have been reviewed the inmate is examined, such a review and examination will be noted in the inmate's health record.

F. *Placement Procedure*:

1. Movement: The inmate will be escorted in handcuffs to a Dry Cell Search room.

a. The inmate will be escorted by two Correctional Officers. One officer will maintain control of the inmate, while the other officer walks behind the inmate.

b. The inmate's pant legs are to be tightly taped so no contraband can be lost by excreting it down the pant leg as the inmate walks.

2. Property: The inmate shall be strip searched upon arrival at the room. All of the inmate's personal clothing will be searched, placed in a bag, inventoried and stored in a secure area.

G. *Watch Procedures and Requirements*:

1. Inmate Clothing: The inmate will be clothed in a pair of specially designed coveralls.

a. The coveralls may be worn over underclothing which consists of shorts and a T-shirt.

b. Underwear shall be exchanged daily.

c. The inmate will remain in the coveralls at all times with the zipper locked and plastic restraints secured in the wrist channels. The officer shall unlock and unzip the coveralls to allow the inmate bowel movements/urination, for medical requirements, and if authorized, bathing.

2. Cell Location, Preparation and Condition:

a. The Dry Cell Search will be performed in a room located in the Medical Unit.

b. The following conditions will be assured when an inmate is placed on Dry Cell Search:

1) The room temperature is to be no lower than 68 degrees, no higher than 90 degrees Fahrenheit.

2) Auxiliary heating may be used to raise the temperature if necessary.

3) The cell temperature reading is to be taken twice during each shift by the assigned officer and recorded in the log book.

4) The cell will be adequately lighted and ventilated.

c. The water to the toilet in the room will be turned off during the entire search procedure.

1) The toilet bowl will be covered, flushed and taped to prevent the inmate from disposing of any objects.

2) A bedpan and/or urinal and toilet paper will be provided when the inmate requests.

d. The cell will be searched to ensure that no contraband is present in it before the Dry Cell Search begins.

e. All items not allowed by this instruction shall be removed from the cell.

f. All windows will be closed and locked.

g. All running water will be shut off.

h. The only authorized furniture in the room is a mattress and pillow which have been searched to ensure no contraband is present.

H. Shift Responsibilities: The Shift Lieutenant shall

1. Ensure each officer assigned to the watch is thoroughly instructed on established procedures before placement on the post.

2. Ensure the officer is relieved after four hours on duty.

3. Provide the officer with the means to contact the Shift Lieutenant without leaving the post.

4. Provide the Dry Cell Search officer with a Special Post Order for Dry Cell Search and a permanent log to record all information pertaining to the watch. The log is to be maintained on file in the Captain's Office for five years.

5. Make at least one post inspection each four hours during the shift to ensure the officer is properly briefed, the watch is being conducted according to established procedures and the logbook is being properly maintained. During these inspections the Shift Lieutenant will check and log the cell temperature.

6. The Shift Lieutenant who is on duty when the inmate is first placed on Dry Cell Search shall give the inmate a copy of DOP Directive 420.311 informing him of the search procedure. The inmate may not keep the copy of the Directive in the Dry Cell.

a. The directive shall be provided in Spanish if necessary.

b. The inmate will acknowledge receipt of the directive in writing. The written acknowledgement will be signed by the inmate, witnessed by the Shift Lieutenant, and attached to the logbook. (Attachment B).

7. The Shift Lieutenant shall make and sign an entry in the logbook noting that the above reference items have been inspected and note any deficiencies and corrective actions.

8. The Shift Lieutenant is responsible for checking the Dry Cell Search log to determine whether the authorized time limits to determine whether they have expired and/or contraband has been retrieved and/or the inmate has had the required number of consecutive normal bowel movements This information shall be reported to the Superintendent through the chain of command.

I. *Health Care Manager shall*:

1. Ensure there are written instructions for medical supervision of a Dry Cell Search procedure. S/he is also responsible to ensure staff are trained and familiar with the medical responsibilities of a Dry Cell Search.

J. *Dry Cell Search Watch Officer shall*:

1. A male correctional officer will be assigned to maintain constant visual observation of the inmate at all times during the Dry Cell Search, and comply with the requirements of this instruction.

VII. PROCEDURES - SPECIFIC

A. Searches:

1. The cell is to be searched at least once per eight hour shift.

2. There will be a through strip search of the inmate and room search at each exchange of clothing.

3. The inmate will be strip searched before being removed from the cell for any activity outside it.

4. The inmate will be strip searched and the cell searched at termination of the Dry Cell Search.

5. All items entering and leaving the room will be searched.

6. Other searches may be performed anytime there is suspicious activity. The reasons for the search will be entered into the log.

7. All searches will be accomplished by a staff member other than the assigned Dry Cell Search officer.

8. All searches will be entered into the log book.

B. Log Book: The Dry Cell Search logbook shall be maintained by watch officer.

1. It is important that the officer not allow the logbook entry to distract him from the inmate's activities.

2. The logbook entries shall include, but not be limited to the following information:

   a. Any statements the inmate makes concerning the circumstances that resulted in his placement on Dry Cell Search,

   b. any unusual behavior,

   c. what and when the inmate eats and drinks

d. the times the inmate urinates and defecates, including the consistency and approximate quantity of feces

e. exercise periods

f. medical staff examinations

g. any contraband recovered, if applicable

h. availability of hygiene items and whether or not the inmate use them

i. all searches (room, pat, skin or body cavity)

j. temperature readings, twice per shift

k. conditions of confinement, any changes to the conditions of confinement and who authorized the changes.

C. When the inmate is removed from the dry cell, he shall be placed in handcuffs and escorted by two staff.

D. Feces and toilet paper will be thoroughly checked by staff utilizing the appropriate protective equipment.

1. If contraband is found, it will be processed in accordance with Contraband Management Field Instructions to ensure the chain of evidence is maintained.

2. Feces and urine will be disposed of by hospital staff flushing it down a toilet other than the one in the dry cell search room.

E. All staff shall use extreme caution and vigilance when involved in a Dry Cell Search to ensure the inmate does not secretly remove an object which may be used as a weapon against the staff, to cause self-injury or to reingest the contraband.

1. In circumstances where the inmate's behavior poses a substantial risk to the safety of the inmate or staff, or the inmate is disruptive and/or uncooperative, the inmate may be maintained in

restraining devices consistent with DOC Policy Directive 420.300, Use of Emergency Restraints.

F. *Conditions During Dry Cell Search*:

1. The conditions of confinement may be further limited for inmates when provision of such rights will result in danger to the inmate, to staff, or present a threat to the maintenance of reasonable order and security within the Institution.

   a. Decisions to limit these conditions in other than emergency situations must be approved in advance by the Superintendent.

   b. Limitations imposed for emergency situations by other staff shall be reviewed as soon as possible by the Superintendent.

2. Following are the conditions of confinement for a Dry Cell Search.

   a. The inmate's personal and legal mail, excluding newspapers, will be delivered to the inmate.

      1) The inmate will be given one piece at a time to read.

      2) After reading the mail, it will be searched and stored with the inmate's clothing and returned to the inmate after the search is terminated.

   b. If the inmate has a court-imposed deadline for any action, the inmate shall notify the watch officer. The officer shall pass the information through the chain of command to the Superintendent, who shall determine what actions need to be taken.

   c. The inmate will not be allowed to have cigarettes, matches or personal articles other than one religious medallion/necklace and one wedding ring.

d. The inmate may have one paperback book or magazine at a time to read or paper and pencil as long as it is not used to hide covert actions designed to remove the contraband. These items shall be removed from the immediate vicinity of the inmate when not being used.

e. One blanket and one pillow are authorized.

f. Except when sleeping, the inmate's hands will be kept in plain sight of the officer at all times.

g. The inmate may have the opportunity to exercise in the cell.

h. No non-staff visitors are permitted.

i. Emergency phone calls may be authorized by the Shift Lieutenant.

j. Unauthorized persons, staff or inmates shall not be allowed in the vicinity of the cell so the officer is not distracted.

G. *Personal Hygiene*:

1. The officer must offer a washcloth, towel, bar of soap and a basin of water before each meal and after each bowel movement/urination.

2. A toothbrush, toothpaste or powder will be furnished after each meal.

3. All personal hygiene items will be searched and removed from the cell after a reasonable amount of time.

4. All hygiene items will be assembled and maintained directly by the officer to ensure availability.

5. The officer will make an entry in the logbook that the hygiene items were offered and the in-

mate's response. The office shall log an entry describing the items refused and the items taken.

6. An inmate shall be allowed and observed and supervised shower if maintained on watch over seven days. The Shift Lieutenant is responsible to ensure that adequate security precautions are taken to prevent the loss of contraband.

H. *Medical Care*:

1. Before placement on the Dry Cell Search, the inmate will be examined by medical staff, and the Health Record examined. X-ray examinations will not be performed unless medically required.

2. The inmate shall be checked by a medical staff member once every eight hour shift. The results of that check will be logged in the logbook and in the inmate's health record.

3. Medications which have been ordered by a health care provider before or during the period in which the Dry Cell Search is in effect will not be restricted by the correctional staff. If restrictions are made by the medical staff, there shall be a logbook entry documenting the decisions and the reasons for the decision.

4. Medical staff shall check for modalities and shall made a decision if a modality is necessary.

5. If an inmate requests medical assistance, the request will be passed to the medical staff by the officer and the medical staff will make the decision as to need.

6. The watch officer may initiate a request for the inmate to be evaluated by medical staff if an adverse reaction or problem is observed.

7. There shall be no restrictions of fluid intake and an inmate shall be provided water upon request.

8. There shall be no interruption of normal food intake. If medically appropriate, the Superintendent may authorized substitution of an approved high fiber/bran diet which is not injurious to the inmate.

VII. *REFERENCES:* DOP420.311

VIII.*SUPERSESSION:* I.O. 09.052

IX. *REVIEW:*

A. This order will be reviewed annually by the Superintendent or his designee for update and/or any required modification.

B. When there is any modification or change to this procedure, it will be sent for review and approval by the Deputy Director.

C. This policy will become effective 30 days from date of Superintendent's signature.

APPROVED this 2nd day of February, 1990.

/s/ James C. Spalding
Superintendent,
Washington State Penitentiary

DEPARTMENT OF CORRECTIONS
DIVISION OF PRISONS

DRY CELL SEARCH AUTHORIZATION

INMATE NAME	NUMBER
LIVING UNIT	DATE OF PLACEMENT

REASONABLE SUSPICION IS AS FOLLOWS FOR PLACEMENT OR EXTENSION: ______________

☐ I APPROVE PLACEMENT ON DRY CELL WATCH
☐ I DISAPPROVE PLACEMENT ON DRY CELL WATCH

☐ I APPROVE A 24 HOUR EXTENSION OF DRY CELL WATCH
☐ I DO NOT APPROVE A 24-HOUR EXTENSION OF DRY CELL WATCH

REASONS ______________

APPROVED CHANGES TO CONDITION OF CONFINEMENT ______________

SIGNATURE	DATE

Attachment B

I have read and undstand the provisions of DOP Division Directive 420.311.

Signed: ____
Inmate Name Number

Witnessed: ____
Shift Lieutenant

APPENDIX I

WASHINGTON ADMINISTRATIVE CODE

WAC 275-80-810 Visits--Purpose. Personal visits are intended to maintain ties between the resident and his family and the community so as to facilitate his successful return to the community. Group visits and media visits are intended to establish closer contact and better understanding between the public and the correctional system.

WAC 275-80-842 Personal visits--Who may not visit. The resident may not receive visits from:

(1) Persons not included on his visiting list for approved visitors as provided for in WAC 275-80-844 unless an exception has been granted in accordance with WAC 275-80-940;

(2) Persons associated with him in the commission of the offense for which he was incarcerated;

(3) Parolees and probationers under active supervision unless they are members of his immediate family or are participating as volunteers or employees of the department in some other approved capacity in institutional programs or activities;

(4) Persons under age 18 except with the consent of the parent or guardian. If under age 16, the visitor must be accompanied during the entire visit by a parent or guardian or any other approved visitor;

(5) Persons under 18 years of age may not participate as a member of a group visiting within the security perimeter of the institution;

(6) Persons who are members of the immediate family or close friends of a resident in the institution shall declare this fact and may enter beyond the security perimeter as part of a group only with the express permission of the superintendent.

[Order 814, § 275-80-842, filed 6/28/73; Order 767, § 275-80-842, filed 1/10/73.]

WAC 275-80-844 Personal visits--Approved visitor lists. At the time of admittance, the resident shall be provided a copy of the personal visiting regulations and shall complete an application for each individual whom he wishes placed on his visiting list. The superintendent shall review each application for completeness, and, as appropriate, promptly and tentatively approve visits for the immediate family. The superintendent shall mail a visitor's questionnaire (see WAC 275-80-995(1)) to each prospective adult visitor, or to the parents or guardians of each prospective visitor under 18 years of age. Upon return and review of the questionnaire, the superintendent shall decide if the individual is to be placed on the resident's permanent visiting list, and shall notify both the resident and the prospective visitor of his decision. Denial of visiting rights must not be made on the basis of race, religion, sex, or national origin. If a person is denied placement on the resident's permanent visiting list, the superintendent shall inform the resident in writing of the reasons therefore.

[Order 814, § 275-80-844, filed 6/28/73; Order 767, § 275-80-844, filed 1/10/73.]

WAC 275-80-846 Personal visits--Alterations to visiting list. (1) A resident may add names to his visiting list in accordance with limitations in WAC 275-80-842;

(2) The superintendent may delete a name from the list upon a finding of violation of visiting rules or serious abuse of visiting on the part of a visitor or resident, in which case he shall notify the visitor and the resident in writing stating the reasons for terminating the visiting rights.

WAC 275-80-925 Denial of visits. The superintendent may deny entrance to visitors if:

(1) The superintendent has prior knowledge leading him to a real suspicion that a visitor is attempting to smuggle in or out of the institution illegal or contraband items If there is real suspicion substantially ahead of the arrival time of the visitor the superintendent should contact local law enforcement officers and allow them to handle any search procedures;

(2) There is a disturbance within the institution;

(3) There is clear and present, or imminent danger to the health and safety of any visitor, resident, or staff member;

(4) He has real suspicion to believe that criminal conduct will ensue if entrance is allowed;

(5) Visiting rights have been seriously abused by the resident;

(6) There is real suspicion to believe the visitor has attempted to bring contraband into the institution;

(7) Visitors fail to abide by the pertinent rules in this chapter.

WAC 275-80-930 Suspension of visiting rights--Duration. Visiting rights may be suspended for a single visitor or all visitors of a single resident depending on the seriousness of a visiting infraction. The visiting rights of a resident charged with violation of visiting rules may be suspended only after a finding of guilt pursuant to a regular disciplinary hearing and such rights may be abridged for a maximum duration of 90 days after which visiting rights shall be restored unless there remains a clear and present, or imminent danger to the health and safety of any visitor, resident, or staff member.

[Order 814, § 275-80-930, filed 6/28/73.]

WAC 275-80-935 Appeal of denial of visiting rights. (1) A visitor may appeal the suspension, disapproval, or termination of his visiting rights to the superintendent of the institution. If still dissatisfied he may appeal by letter tot he administrator of adult corrections. The letter should state the reason why the visitor should be permitted to visit and the circumstances surrounding the denial or termination.

(2) A group or a representative of the news media denied entrance to the institution or required to leave, may appeal to the secretary or his designee. The appeal should state the reasons the group or the representative believes he should be permitted to visit and the circumstances surrounding the denial or termination.

[Order 814, § 275-80-935, filed 6/28/73.]

WAC 275-80-940 Exceptions. The superintendent may grant exceptions to normal visiting procedures in unusual circumstances to meet the special needs of a resident.

APPENDIX J

Ch. 21
CIVIL RIGHTS
42 § 1983

§ 1983.
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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NO. 92-579 (2)

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,

Petitioner,

V.

ROGACIANO GONZALES MENDOZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MAUREEN E. LAFLIN
Counsel of Record

University of Idaho
College of Law
Legal Aid, Room 10
Moscow, Idaho 83843
(208) 885-6541

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Rogaciano Gonzales Mendoza respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in *Mendoza v. Blodgett,* 960 F.2d 1425 (1992).

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings.

Respondent Rogaciano Gonzales Mendoza ("Mendoza"), who was aligned as Plaintiff below, filed the instant civil rights action on or about December 5, 1989, pursuant to 42 U.S.C. Section 1983. Mr. Mendoza is an inmate at the Washington State Penitentiary ("WSP") at Walla Walla, Washington. Petitioners ("the State"), who were aligned as Defendants below, were administrators at Washington State Penitentiary. They include: James Blodgett, former Superintendent, WSP; Gary Edwards, Correctional Lieutenant, WSP; Edith Jones, Corrections Officer, WSP; Ron Van Boening, Associate Superintendent, WSP; Jack Lambert, Associate Superintendent, WSP; and Lawrence Kincheloe, former Director of the Division of Prisons, Washington State Department of Corrections.

Mr. Mendoza sued the defendants for depriving him of his due process rights in regard to the implementation of two WSP policies: (1) the Feces Watch[1] policy; and (2) the visitation policy. Mr. Mendoza alleged that the State deprived him of certain basic Constitutional rights under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution. *Mendoza v. Blodgett,* 960 F.2d 1425,1427 (9th Cir. 1992).

Defendants and Plaintiff filed respective motions for summary judgment. On December 21, 1990, the District Court granted summary judgment in favor of the Defendants on all issues except Plaintiff's due process claims. The district court requested supplemental briefing on the due process issues. Subsequently, on February 7, 1991, the court granted summary judgment in favor of Defendants on Plaintiff's due process claims.

---

[1] Feces Watch or dry cell watch refers to a procedure governed by a policy which directs the Superintendent or his designee, upon reasonable suspicion that an inmate is secreting contraband, to place the inmate in a custody-locked cell in the WSP Hospital, in which water to the cell is turned off, for the purpose of examining at least three consecutive bowel movements for the presence of contraband.

The court's order granting summary judgment stated that the WSP Feces Watch and visitation policies created protected liberty interests. However, the court determined the Defendants were entitled to qualified immunity. *Mendoza*, 960 F.2d at 1427.

Plaintiff appealed the district court's dismissal of his due process claims. The Defendants cross-appealed the finding of state created liberty interests under the Feces Watch policy and the visitation regulations. *Mendoza,* 960 F.2d at 1427.

On appeal, the Ninth Circuit Court of Appeals affirmed the decision of the district court. The Court of Appeals found that the Feces Watch policy and the visitation policy granted Mr. Mendoza state created liberty interests because the language of the regulations contained substantive predicates and mandatory language, as required by *Hewitt v. Helms,* 459 U.S. 460, 472 (1983) and *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 463 (1989).

Additionally, the court found the hearing conducted five days after the completion of the watch insufficient to accord Mr. Mendoza due process. However, the court held the Defendants were entitled to qualified immunity. *Mendoza,* 960 F.2d at 1429-31. The court found the suspension of visitation privileges and informal infraction hearing did not violate procedural due process. *Id.* at 1432-33.

II. Relevant Facts.

On September 29, 1989, Mrs. Mendoza and their six children visited Rogaciano Mendoza in the visiting room of the Washington State Penitentiary (WSP). Correctional Officer Edith Jones monitored the visit from the floor of the visiting room and Correctional Officer Larry Brown watched from the visiting room security booth. The Mendoza children requested use of the restroom facilities at approximately 6:45 p.m.. After unlocking the door to the hallway which led to the restroom, Officer Jones prepared to escort the children to the restroom. Officer Jones then noticed a balloon on the floor with the tip bitten off and covered with a white, slimy substance. Officer Jones informed her supervisor of what she had found. The supervisor informed Associate Superintendent Lambert of the situation. *Mendoza,* 960 F.2d at 1427.

Lambert believed that there was reasonable suspicion that Mr. Mendoza may have ingested a similar balloon or its contents based on Lambert's knowledge of common methods used to smuggle contraband into penal institutions. Lambert authorized placement of Mr. Mendoza in Feces Watch. *Id.* at 1427.

The Feces Watch procedures, which are listed in WSP's Institutional Order ("IO") 09.053 (Appendix A), allow for an inmate to be placed on dry cell watch after a correctional officer has determined that there is "reasonable suspicion" that the inmate is secreting contraband. The procedures are designed to examine inmates' fecal samples for contraband.

Mr. Mendoza was placed on Feces Watch at 8:40 p.m. on September 29, 1989. Mr. Mendoza was placed in a hospital cell, strip searched, and given a clean pair of shorts. He was required to sleep on a mattress on the floor without a blanket. He defecated five times during that 24 hour period. Officers carefully examined each bowel movement and found no contraband. A full day later, at 8:40 p.m. on September 30, 1989, Mr. Mendoza was released from the dry cell. *Id.* at 1428.

The charge against Mr. Mendoza of attempting to smuggle illegal contraband into the Institution was heard on October 5, 1989. The hearing board found Mr. Mendoza guilty of the infraction. However, nearly a month later on November 3, Superintendent Blodgett reviewed the infraction and dismissed it. He determined that although the officers had reasonable suspicion to place Mr. Mendoza on Feces Watch, there was a lack of proof of Mr. Mendoza's direct involvement. Nevertheless, Superintendent Blodgett, relying on WSP's visitation policy, IO 16.020 (Appendix B), suspended Mr. Mendoza's visiting privileges with his wife and children for 90 days. *Mendoza,* 960 F.2d at 1428.

The visitation policy lists nine specific circumstances under which an inmate's visitation rights can be suspended. Washington Administrative Code (WAC) 275-80-930 (Appendix C) requires that an inmate be found "guilty" of an infraction before visitation privileges can be suspended. When privileges are suspended, written notice shall be given. Officials notified Mr. Mendoza and his wife of their suspended visitation. Reinstatement of Mr. Mendoza's regular contact visits with his family began in February 1990.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *HEWITT v. HELMS* AND *KENTUCKY DEPARTMENT OF CORRECTIONS V. THOMPSON* AND PROPERLY FOUND THE FECES WATCH POLICY AND THE VISITATION POLICY CREATED CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS.

The Ninth Circuit applied the rule of *Hewitt v. Helms,* 459 U.S. 460, 472 (1983), and *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 463 (1989), and properly held that the language of the regulations governing Feces Watch and visitation created liberty interests. The Ninth Circuit found the mandatory language and the substantive predicates in IO 09.053 (Appendix A), IO 16.020 (Appendix B) and WAC 275-80-930 (Appendix C). The court recognized that these regulations granted Mr. Mendoza protected state created liberty interests in remaining in the general prison population and in maintaining uninterrupted visits with his wife and children.

The rule this Court set forth in *Hewitt v. Helms,* 469 U.S. at 472, and again in *Kentucky Department of Corrections v. Thompson, 490 U.S.* at 463, is clear: substantive predicates and mandatory language contained within state law create a liberty interest protected by the Fourteenth Amendment.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, Sec. 1. This Court holds that liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself or state law. *Hewitt v. Helms*, 459 U.S. at 466; *Meachum v. Fano*, 427 U.S. 215, 223-227 (1976).

State's most commonly create liberty interests by establishing "substantive predicates" to govern official decisionmaking and by mandating the outcome to be reached upon a finding that the relevant criteria have been met. *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Hewitt*, 469 U.S. at 472). Language of "unmistakably mandatory character" must be used in the regulations. *Hewitt*, 459 U.S. at 471. Furthermore, in *Kentucky Department of Corrections* this Court stated: "The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." 490 U.S. at 464 n.4.

To summarize *Hewitt,* statutes and regulations governing daily operation of a prison system have never conferred any liberty interest *in and of themselves.* 459 U.S. at 469 (citing *Meachum v. Fano*, 427 U.S. 215 (1976)). However, where a state goes beyond the simple procedural guidelines, and uses mandatory language and specifies substantive predicates, the state creates a protected liberty interest. *Hewitt*, 459 U.S. at 471-72.

The Ninth Circuit recognized in this case that Washington created protected liberty interests by adopting regulations containing mandatory language and substantive predicates to govern official decisionmaking at the Washington State Penitentiary. *Mendoza v. Blodgett,* 960 F.2d at 1428-29. The court applied this rule to both the Feces Watch procedure and to visitation regulations at issue in *Mendoza*.

Under the Feces Watch procedure, the court found substantive predicates in IO 09.053(V): "[a]n inmate will be placed upon Feces Watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband." The Feces Watch Procedure defines reasonable suspicion as follows:

> Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

IO 09.053(IV). (Appendix at A-1).

Additionally, the Ninth Circuit found that IO 09.053(V) contained the requisite mandatory language because the "decisionmaker must decide whether to place a prisoner on a dry cell watch by determining if reasonable suspicion exists." *Mendoza,* 960 F.2d at 1429. The regulation calls for a two-step process. First, the superintendent or his designee must determined whether a reasonable suspicion exists. If it does, then the second step is to place the inmate on Feces Watch and follow the listed procedures.

A protected liberty interest is created because the substantive predicates and mandatory language give the superintendent no discretion but to follow Feces Watch procedures once he determines that there is reasonable suspicion that an inmate is secreting contraband. 960 F.2d at 1429. In other words, an inmate cannot be placed in the dry cell watch for any reason or no reason at all; an inmate may expect he will not be placed on dry cell watch in the absence of "reasonable suspicion" that he is secreting contraband.

The Ninth Circuit also correctly applied *Hewitt* when it found WSP's visitation regulations created a liberty interest. IO 16.020(VI)C (Appendix at B-8), which provides an *enumerated list of circumstances* under which a visit can be denied or visiting privileges can be suspended, provides the substantive predicates. Additional substantive predicates are contained in Washington Administrative Code Sec. 275-80-930 (Appendix C-1), which provides that visiting rights of the prisoner may be suspended "only after a *finding of guilt" pursuant to a regular disciplinary hearing*. *Mendoza*, 960 F.2d at 1432. (emphasis added).

WAC 275-80-930 also contains the requisite mandatory language: suspension of visiting privileges may occur "*only after* a finding of guilt." (Appendix at C-1). As the court stated: "Thus, an inmate may reasonably form an objective expectation that visiting privileges will not be suspended without compliance with the applicable rules." *Mendoza,* 960 F.2d at 1433 (citing *Kentucky Deptartment of Corrections,* 490 U.S. at 464-65).

As such, Mr. Mendoza has a protected liberty interest in maintaining uninterrupted visits with his wife and children. The overall effect of the regulations enables Mr. Mendoza to form a reasonable expectation that his wife and children will be allowed to visit absent the occurrence of any of the conditions listed in the regulations.

Thus, the Ninth Circuit Court of Appeals correctly applied the rule set forth in *Hewitt v. Helms* to both the Feces Watch and the visitation procedures. The state went beyond mere procedural guidelines and used substantive predicates and mandatory language to create. Mr. Mendoza, therefore, has protected liberty interests. Therefore the State's petition should be denied.

II. NEITHER THE AMOUNT OF OFFICIAL DISCRETION ALLOWABLE UNDER *HEWITT V. HELMS*, NOR QUESTIONS REGARDING PROCEDURAL REGULATIONS AND BOILERPLATE LANGUAGE IN PRISON REGULATIONS ARE RELEVANT TO THIS CASE.

A. The Ninth Circuit's Decision In *Mendoza v. Blodgett* Falls Under The Rule Of *Olim v. Wakinekona* Which Clarified The Amount Of Official Discretion Allowable Under *Hewitt v. Helms*.

The regulations at issue in this case, IO 09.053, IO 16.020, and WAC 275-80-930, eliminated official discretion regarding Feces Watch and visitation. *Mendoza v. Blodgett,* 960 F.2d at 1429, 1432-33. For example, IO 09.053 provides a mandatory two-step process: if prison officials determine that reasonable suspicion exists, then the officials must place the inmate in Feces Watch and follow the listed procedures. Similarly, WAC 275-80-930 provides that the visitation rights of an inmate charged with a violation of the visiting rules (set forth in IO 16.020) may *only* be suspended after a finding of guilt in a regular disciplinary hearing.

The State contends that confusion exists as to whether *Hewitt* requires the elimination or just limitation of official discretion. While Respondent finds no such confusion, even if any exists, it is irrelevant to this case. As noted above, the Ninth Circuit found the regulations at issue in this case eliminate official discretion. Yet even if the regulations do not eliminate discretion, but only substantively limit it, this would still be consistent with this Court's holding in *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983).

Olim v. Wakinekona, which was decided shortly after *Hewitt,* held that a state "creates a protected liberty interest by placing substantive limitations on official discretion." 461 U.S. at 249. Further this Court wrote: "If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' the State has not created a constitutionally protected liberty interest." *Id.* at 249 (citing *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467 (1981)).

Therefore, the Ninth Circuit's opinion in *Mendoza* falls within the rule of *Olim.* As such, the question regarding the quantity of official discretion allowable is irrelevant.

In support of its contention that the *Hewitt* rule has received inconsistent application, the State cites the Sixth Circuit Court of Appeals' decision in *Doe v. Sullivan County, Tenn.*, 956 F.2d 545 (1992). In *Doe*, the Sixth Circuit found that substantive predicates which limit discretion are sufficient to create a liberty interest. All official discretion need not be eliminated. *Id.* at 557.

The State mistakenly claims *Doe* is inconsistent with *Hewitt*. To the contrary, *Doe* is fully consistent with *Olim*, and therefore *Hewitt*. *Hewitt* did not expressly focus on the amount of allowable discretion. *Hewitt's* focus was on the requirement of "specific substantive predicates" and "repeated use of explicit mandatory language." 459 U.S. at 472. However, as stated above, just a short time after *Hewitt* this Court held "that a State creates a protected liberty interest by placing substantive limitations on official discretion." *Olim*, 461 U.S. at 249. Therefore, the holding in *Doe* requiring limitation but not elimination of discretion is consistent with *Olim* and *Hewitt*.

Therefore, the precise amount of official discretion allowable in this case is irrelevant. The WSP regulations eliminated discretion. *Mendoza*, 960 F.2d at 1429, 1432-33. To the extent, if at all, the regulations left a window of discretion, the opening fell within the perimeters of *Olim*. Accordingly, this Court should not grant certiorari on the issue of allowable discretion.

B. While Liberty Interests May Be Properly Defeated By Mere Procedural Regulations Or Boilerplate, Disclaimer Language, The Regulations At Issue in *Mendoza v. Blodgett* Contained No Such Language.

The State erroneously argues that *Hewitt* is applied inconsistently among the circuit courts because procedural regulations create liberty interests in some instances and not in others. Petition page 15-16. The State contrasts the holdings of the Seventh Circuit Court of Appeals in *Smith v. Shettle,* 946 F.2d 1250 (1991), with the Ninth Circuit Court of Appeals in *Mendoza v. Blodgett,* 960 F.2d 1425. Contrary to the State's assertion these two cases are consistent, even though at first glance they may appear to stand in opposition.

The Seventh Circuit in *Shettle* held that the procedural regulation which established a 30 day review procedure for administrative segregation did not create a liberty interest. While the Ninth Circuit in *Mendoza* recognized liberty interests in the procedural regulations for both visitation and dry cell watch, 960 F.2d at 1425, this holding is distinguishable from *Shettle* because the procedural regulations in *Mendoza* contain substantive predicates and mandatory language. The regulations dictate to prison personnel when and why an inmate is to be placed in Feces Watch or to be denied visitation.

Additionally, both holdings are consistent with *Hewitt*. *Hewitt* stands for the proposition that procedural regulations do not in and of themselves confer any liberty interest, but where the regulations go beyond simple procedural guidelines, the issue of state created liberty interest arises. 459 U.S. at 469-71. The review procedure in *Shettle* was a mere procedural regulation. In contrast, the regulations in *Mendoza* went beyond simple procedural guidelines in that specific criteria and mandatory language are contained in the regulations, thus creating a liberty interest. 960 F.2d at 1428-29, 1432-33.

As such, there is no confusion or inconsistency over whether "procedural regulations" grant liberty interests in some cases and not in others. *Shettle* and *Mendoza* are consistent with *Hewitt*. Accordingly, this is not a proper issue for which to grant certiorari.

The State raises yet another non-issue when it argues that confusion exists over the use of boilerplate language and disclaimers in prison policies. Petition page 16-17. The State notes that the Ninth Circuit found the absence of boilerplate, disclaimer language as relevant to the creation of liberty interests. Petition page 16-17. The State contrasts *Mendoza* with *Kentucky Department of Corrections,* 490 U.S. at 465, and *Williams v. Kyler,* 680 F.Supp. 172, 173 (M.D.Pa. 1986), *aff'd*, 845 F.2d 1018 (3rd Cir. 1988), in which the existence of boilerplate, disclaimer language in the regulations defeated the creation of a liberty interest.

One wonders where the State finds confusion. The three cases are consistent with each other and with *Hewitt*. The focus is on the language used. The presence of boilerplate, disclaimer language gives discretion to officials and does not give an overall effect "such that an inmate can reasonably form an objective expectation". *Kentucky Department of Corrections,* 490 U.S. at 465. In contrast, the absence of boilerplate language or other disclaimer granting language is consistent with *Hewitt* and can create a liberty interest.

Thus, the State's contentions set forth above are irrelevant and mistaken. They do not require clarification by this Court because the confusion and inconsistencies the State worries about do not exist.

III. The Rule Set Forth in *Hewitt v. Helms* and *Kentucky Department of Corrections v. Thompson* is Not Limited to Prison Regulations Affecting the Duration of, or Release from, Confinement in Prison.

The rule of *Hewitt* and *Kentucky Department of Corrections* is not limited to prison regulations affecting the duration of, or release from, confinement in prison. As this Court stated in *Kentucky Department of Corrections:*

> The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not

> the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations.

490 U.S. at 461.

In *Hewitt,* an inmate was confined to administrative segregation pending investigation into his role in a Pennsylvania State prison riot. In reviewing the inmate's due process claims under the Fourteenth Amendment, this Court indicated that it is normally reluctant to interfere in the everyday administration of a prison system, and that deprivations imposed in day-to-day administration are likely to be minor when compared to the "release from custody at issue in parole decisions and good-time credits." *Hewitt,* 459 U.S. at 470. Nonetheless, this Court concluded "in light of the Pennsylvania statutes and regulations here in question ... respondent did acquire a protected liberty interest in remaining in the general prison population." *Id.* at 470-71. This Court focused on the language used in the regulations. *Id.* at 472.

Kentucky Department of Corrections involved suspension of inmates' visitations rights. This Court stated that "state law may create enforceable liberty interests in the prison setting." 490 U.S. at 461. The opinion of this Court did not suggest that one type of regulation is more significant than another. Rather, this Court stated that "our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations." *Id.* at 461.

Read together, *Hewitt* and *Kentucky Department of Corrections* recognize that regulations governing everyday prison administration procedures, such as administrative segregation, are relatively minor as compared with regulations governing what the State calls "duration of, or release from confinement" issues. Nonetheless this Court held in both cases that all regulations containing mandatory language and substantive predicates create liberty interests.

The State mistakenly argues that a bright line rule should now be established in which only those prison regulations which affect the duration of or release from confinement would be entitled to due process protection. Petition page 9. The only basis for the State's assertion is dicta contained in footnote 3 in *Kentucky Department of Corrections,* 490 U.S. at 461-62. The State suggests that regulations governing administrative segregation, dry cell watch, restrictions of visits to particular visitors, inmate placement, employment and other management issues should not be given due process protection unless a state clearly states an intent to do so. Petition page 20.

The self serving nature of this suggestion underscores its implausibility. If prisoners' liberty interests were solely dependent on state action, prisoners would be without any real protection. Moreover, the bright line rule suggested by the State is unnecessary because the rule as set forth in both *Hewitt* and *Kentucky Department of Corrections* is clear. The focus is on the language of the statutes and regulations used: where they contain mandatory language and substantive predicates, a liberty interest is found. Both *Hewitt* and *Kentucky Department of Corrections* applied this rule to regulations which did not affect duration of, or release from prison.

A few of the federal appellate court cases which have applied the rule of *Hewitt* to non-durational/release issues and recognized a liberty interest include: *Gittens v. LeFevre,* 891 F.2d 38 (2d Cir. 1989); *Layton v. Beyer,* 953 F.2d 839 (3d Cir. 1992); and *Sheley v. Dugger,* 833 F.2d 1420 (11th Cir. 1987). *Gittens* involved regulations governing placement of an inmate in "keeplock", a form of administrative segregation in which an inmate who has misbehaved is confined to his cell, deprived of participating in the normal prison routine, and denied contact with other inmates. A disciplinary hearing must be held within seven days of confinement. 891 F.2d at 39. The court recognized a liberty interest because New York law used mandatory language ("shall") and required specific substantive predicates ("reasonable ground to believe inmate ... represents immediate threat to the safety, security or order of the facility or immediate danger to other person or to property"). *Id.* at 40.

Layton v. Beyer involved placement of an inmate in restrictive custody. The substantive predicates of "threat to safety of others, a threat to property, or a threat to operation of a facility" together with mandatory language lead the inmate to form a reasonable expectation that he would not be confined in the Management Control Unit absent meeting the criteria. As such, the Third Circuit Court recognized a protected liberty interest. 953 F.2d at 846.

Similarly, regulations governing placement of an inmate in Close Management solitary confinement created a liberty interest in *Sheley v. Dugger*. The court likened administrative confinement to the facts of *Hewitt* in that an inmate could only be placed in administrative confinement for certain reasons ("disciplinary charges or criminal charges pending against inmate and presence in general population presents a clear danger"). Also, the regulation contained mandatory language ("shall be for shortest time possible" and "inmate shall be given opportunity to present his views"). 833 F.2d at 1424.

These few cases illustrate that, like *Hewitt,* regulations containing mandatory language and substantive predicates create a liberty interest even though they do not affect the duration of, or release from prison.

Some federal appellate courts have applied the rule of *Hewitt* to non-durational/release issues without recognizing a liberty interest: e.g., *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991); *Williams v. Armontrout,* 852 F.2d 377 (8th Cir. 1988), *cert. denied,* 488 U.S. 996 (1988); and *Dorman v. Thornburgh,* 955 F.2d 57 (D.C. Cir. 1992). These cases are all distinguishable from the instant case.

The court in *Wallace* refused to recognize a liberty interest because the prison regulation allowed transfer of a prisoner's work assignment for *any* reason except punishment. The court reasoned that the broad field of discretion an official had in transferring a prisoner's work assignment placed the regulation outside the ambit of *Hewitt*. 940 F.2d at 246-47.

In *Williams,* an inmate was placed in the Special Management Facility, a behavioral modification unit. The policy governing Special Management Facility requires that a committee review classification every 90 days. Following this classification meeting, the inmate is to be given reasons for his continued classification in the unit. *Williams,* 852 F.2d at 378. Consistent with *Hewitt,* the court looked for substantive predicates and mandatory language. The court held that the regulations did not contain substantive predicates, but were only mere procedural guidelines and thus did not create a liberty interest. *Williams,* 852 F.2d at 379.

The court in *Dorman v. Thornburgh,* 955 F.2d 57 (D.C. Cir. 1992) refused to recognize a liberty interest in regulations regarding the terms and conditions of prison employment because the regulations lacked mandatory terms. Prison officials possessed full discretion to set the terms and conditions of prison employment. *Id.* at 58.

The above three cases, consistent with *Kentucky Department of Corrections,* illustrate that: (1) the *Hewitt* rule is applicable to all regulations; and (2) where regulations to not contain either the substantive predicates or the mandatory language, or both, no liberty interest is created.

In summary, this Court has recognized that prison officials have broad administrative and discretionary authority over the institutions they manage, and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. *Hewitt,* 459 U.S. at 467. Administrative segregation is the sort of confinement that inmates should reasonably expect to receive at some point in their incarceration, and it does not involve an interest independently protected by the Due Process Clause. *Id.* at 468. However, even with this underlying recognition, the focus of this Court has not been, nor should it be, on preferring durational/release issues over administrative segregation type issues. Rather, the focus has been on establishing the standard as to what establishes a state created liberty interest through the content of the regulations themselves. The rule in *Hewitt v. Helms* is not dependent upon the subject matter that the statutes and regulations govern, but upon the plain meaning of the *content* of the statutes and regulations -- mandatory language and substantive predicates. Therefore, this Court should deny certiorari in this case.

CONCLUSION

For these reasons, respondent respectfully requests that this Court to deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED this 2nd day of November, 1992.

MAUREEN E. LAFLIN, Esq.
MICHELLE M. EVANS
Legal Intern

Counsel for Respondent

APPENDIX A

DEPARTMENT OF [illegible]RECTIONS

INSTITUTIONAL POLICY AND PROCEDURES

POLI[illegible]MBER	PAGE
I.O. 09.053	1 of 4

REFERENCES

Ret. I.O. 09.052 Body Cavity Search Procedures, 09.150 Contraband Management

CHAPTER	SUBJECT
SECURITY & CONTROL	FECES WATCH PROCEDURE

I. AUTHORITY: RCW 69.50, RCW 9.94.049, RCW 9.94.041; DOC 421.110.

II PURPOSE: Feces watches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate. Approval for a Feces Watch must be obtained from the Superintendent or his designee with the rank of Captain or above.

III. APPLICABILITY: To all staff and especially to those Correctional Supervisors and employees who are involved in the search of inmates housed at the Washington State Penitentiary.

IV. DEFINITIONS:

Feces Watch: The placement of an inmate in a custody-locked cell, for the purpose of maintaining and inspecting at least (3) three consecutive normal bowel movements for contraband.

Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

V. POLICY: An inmate will be placed upon Feces Watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband. In cases where an inmate informant supplies information upon which "Reasonable Suspicion" is based, the past reliability or unreliability of the inmate informant shall be considered as well as the specificity of the information provided and whether the inmate has any advantage to be gained from providing the information. Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first. In cases where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period, 24-hour extensions may be authorized by the Superintendent or his designee with the rank of Captain or above until the inmate has had the equivalent of three normal bowel movements. In cases where there is specific and reliable information if the subject of the search is secreting contraband on his person by means of a method which would prevent the contraband from being passed after three normal bowel movements, or the equivalent thereof, then 24-hour extensions up to seven days from the beginning of the initial placement on Feces Watch may occur upon the authorization of the Superintendent ONLY. (Attachment A) In the event of no bowel movements or re-ingesting the contraband and the time limit may excede 7 days, the Director of Prisons may authorize 24-hour extensions as needed.

EFFECTIVE/REVISION DATE: October 28, 1988

SUPERCEDES: August 20, 1987

DOC 16-29 (8 83) -416-

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VI. PROCEDURE: To outline procedures which will enable staff at the Washington State Penitentiary to effectively monitor, recover and process contraband believed to be carried internally by an inmate.

A. Escort inmate to the Hospital from the place of the incident.

1. The inmate will be escorted in handcuffs by two (2) Correctional Officers to a custody locked cell in the Hospital, or to surgery if a body cavity search is required (follow procedures in I.O. 09.052). One officer will maintain control of the inmate, while the other officer walks behind the inmate. If the inmate is suspected of having placed the contraband in his rectum, particular attention should be given to the possiblity of him excreting it down his pant leg. The inmate's pant legs are to be tightly taped so no contraband can be lost.

2. Upon arrival in the custody locked cell, the handcuffs will be removed and one officer will strip search the inmate. The Shift Lieutenant/Sergeant will check the condition of the cell and mattress prior to occupancy and so indicate in the log. The second officer will place all of the inmate's clothing, except his shorts, in a plastic bag, attach an inventory slip provided by the Hospital and secure it in a place designated by Hospital staff.

3. Prior to placement, an inmate's medical record should be consulted for modalities. If present, medical staff should be consulted for need during the watch period. This will be documented in the log.

B. Officer and medical staff instructions for inmates placed on feces watch.

1. The Feces Watch Officer will be relieved at 4-hour intervals. The Shift Lieutenant/Shift Sergeant are to make at least one round during each officer's watch. The Feces Watch Officer will be provided with verbal instructions and a folder by the Shift Lieutenant which will contain the following:

   a. I.O. 09.053 - Feces Watch Procedure
   b. I.O. 09.052 - Body Cavity Search Procedures
   c. I.O. 09.150 - Contraband Management
   d. Two (2) evidence bags and four (4) evidence cards (more may be obtained if necessary)
   e. Feces watch logs.

2. The cell is to be searched at least once per 8-hour shift. The Shift Sergeant is to assign the appropriate staff to accomplish this.

3. The cell temperature reading is to be taken twice a Shift and recorded in the Shift and Feces Watch Log. The cell temperature shall be no lower than 68 degrees Farenheit, and may be higher. If the Shift Lieutenant/Sergeant believes an insulated top is warranted one will be issued. If the inmate abuses the privilege, the top will be recovered.

4. While the inmate is restrained, he will be exercised for 15 minutes every four (4) hours. (This will be logged.)

5. A feces watch log will be completed by each feces watch officer. All blocks must be filled out completely. Information should include what the inmate says, if it could relate to the suspected contraband, how the inmate acts, what the inmate eats and drinks and the times, consistency and quantity of his bowel movements and urination.

6. The water in the custody locked cell will be turned off during the period of the feces watch. A bedpan and urinal will be provided when the inmate requests them. Feces will be thoroughly checked by the feces watch officer. If contraband is found, I.O. 09.150 -Contraband Management, will be followed. However, the feces watch officer may NOT leave the cell to contact the Shift Lieutenant or process the evidence until another officer relieves him. The same rule applies when the officer has to leave the cell for any other reason during his shift.

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7. Feces and urine will be disposed by medical staff by flushing them down a toilet, other than the one in the cell in which the feces watch is taking place.

8. Normally the inmate will be attired in shorts only. A mattress on the floor is the only bedding provided. No sheets, pillows, pillow cases or blankets are to be provided.

9. The inmate is not allowed to have cigarettes, matches, mail, reading materials or any other personal articles.

10. No telephone calls or showers will be permitted.

11. At the following listed times each day the inmate will be provided access to the listed hygiene items:

    a. Access Period:
        1. 6:15 AM to 6:30 AM (Breakfast)
        2. 10:15 AM to 10:30 AM (Lunch)
        3. 3:30 PM to 3:45 PM (Dinner)
        4. After any bowel movement

    b. Hygiene Articles:
        1. One (1) Wash Cloth
        2. One (1) Face Towel
        3. One (1) Bar Soap
        4. One (1) Toothbrush and sufficient tooth powder to brush his teeth.
        5. One (1) Wash Basin

At the end of the allotted time, all hygiene articles will be returned to the medical staff. The Feces Watch Officer shall log the availability of these items and shall note whether or not the inmate used any or all of them.

11. The Feces Watch Officer is not to take his eyes off the inmate at any time. The inmate's hands are to be kept in plain sight at all times.

12. Failure to follow this procedure will result in disciplinary action.

VI. REVIEW:

A. This Order will be reviewed annually by the Superintendent or his designee for update and/or any required modifications.

B. When there is any modification or change to this procedure, it will be sent for review and approval by the Deputy Director.

C. This Order will become effective immediately on date of Superintendent' signature.

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APPROVED: ______________________ DATE: 28 Oct 88
Superintendent, Washington State Penitentiary

DEPARTMENT OF CORRECTIONS

INSTITUTIONAL POLICY AND PROCEDURES

POLICY NUMBER
16.020

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REFERENCES
DOC 420.100
ACA 2-4338, 2-4369 thru 2-43
WAC 137-44-005 thru 135
CSB 16.10 thru 16.15

CHAPTER
COMMUNICATION, MAIL AND VISITING

SUBJECT
INMATE VISITING

I. AUTHORITY: Policy Directive 420.100.

SCOPE: Each visiting location at Washington State Penitentiary will have a Procedure Manual detailing visiting within their location.

II. PURPOSE: To set forth a policy and establish regulatory procedures for administering the visiting program and to provide an effective visiting program that will enhance rehabilitative efforts, establish a normalization of social relationships, and satisfy security requirements of this facility.

III. APPLICABILITY: To all inmates and personnel of the institution, and especially to the appropriate Associate Superintendent, and Visiting Room Staff.

III. DEFINITIONS:

A. Container Search: An inspection of items brought into a facility by visitors including, but not limited to a search of briefcases, handbags, lunch boxes, envelopes and other items. Such searches may be conducted absent any reasonable suspicion or on a random basis.

B. Contraband: For purpose of this policy, contraband is defined as any unauthorized item which a correctional facility prohibits from possession by offenders on institution grounds or within the secure perimeter of the facility and any unauthorized item which may not be legally possessed by a visitor or offender on the grounds or within the perimeter of a correctional facility including, but not limited to any explosive, any deadly weapon as defined by RCW 9.94.043, any drug as defined by RCW 9.94.045, any controlled substance as defined in Chapter 69.50 RCW, and any alcoholic beverage.

C. Electronic Search: A scan of the personal effects and the clothed body of an individual by use of a hand-held or stationary metal detector or electronic viewing device.

D. Locker Search: Lockers are the property of the Department of Corrections, which may be made available for the convenience of visitors. The facility shall maintain a key for all lockers and may inspect them absent any reasonable suspicion or on a random basis

E. Pat Search: Patting the hands down the clothed body of a visitor. Such searches may be conducted absent any reasonable suspicion on a random basis.

F. Reasonable Suspicion: A reasonable suspicion is one based on specific objective information along with all the rational inferences the authorizing official is entitled to draw from the information, in light of that official's experience, that the visitor may possess contraband. Some factors which can be considered in determining reasonable suspicion include:

1. The nature of the tip or information
2. The reliability of the informant
3. The degree of corroboration
4. The response of the search dogs
5. Other facts contributing to suspicion or lack thereof, such as contraband discovered or other pertinent information revealed by a pat, electronic, strip or other search.

G. Strip Search: A search of all of a visitor's clothing and the visual examination of the visitor's naked body, including the mouth and the areas between the fingers and toes and under the armpits and soles of the feet. Such searches may be conducted only on reasonable suspicion to believe a visitor possesses contraband on his or her person.

H. Vehicle Search: An inspection of any vehicle entering the grounds or perimeter of a correctional facility including, but not limited to looking under the hood, under seats, into glove boxes, into the trunk and a container search of all items transported in the vehicle. Such searches may be conducted without reasonable suspicion the visitor is transporting contraband and on a random basis.

I. Visitor: For purposes of this policy a visitor is defined as any person who enters the grounds or perimeter of a correctional facility who is not a correctional employee as defined in Policy Directive 420.120.

J. Use of Canines: All searches which can be conducted on a random basis may be aided by trained dogs only with authorization of the Superintendent or his designee.

V. POLICY:

A. This Policy will be reviewed with inmates during orientation. A copy of the document will be made available or posted in the following areas: Visiting Room, Information Desk, Inmate Library and Inmate Living Units.

B. The number of visitors an inmate may receive and the length of visits shall be limited only by the institution's schedule, space and personnel requirements. Inmates shall not be denied visitation with persons of their choice except:

1. Persons associated with him in the comission of the offense for which he was incarcerated.

2. Minor children who are identified as victims of sexual molestation by the inmate.

3. Parolees and probationers under supervison unless authorized by the Superintendent or his designee.

4. Ex-offenders unless authorized by the Superintendent or his designee.

5. Persons under 18 years of age may not participate as a member of a group visiting within the security perimeter of the institution.

C. This institution shall provide a visiting room for inmates and their guests that allow ease and informality of communication in a natural environment. It shall be arranged with the comfort and privacy of the visitor in mind, and to allow for socially acceptable physical contact during visiting.

D. VISITING HOURS:
Visitors will not be allowed on Institutional grounds earlier than one-half hour (30 minutes) prior to the processing for the area they are visiting.

1. MAIN INSTITUTION: Visiting days are rotated by inmate housing assignments. Schedules are posted in the Units and copies are on file at the Information Desk.

Wednesday through Sunday	12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:30 p.m.
Processing closes at:	2:30 p.m. & 7:00 p.m.

2. MEDIUM SECURITY COMPLEX (MSC):

Wednesday through Thursday	5:30 p.m. to 8:00 p.m.
Friday, Saturday, and Sunday	12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:00 p.m.
Processing closes at:	2:00 p.m. & 6:30 p.m.

3. MINIMUM SECURITY UNIT (MSU):

Wednesday through Saturday	5:30 p.m. to 8:30 p.m.
Saturday and Sunday	8:00 a.m. to 10:30 a.m. 12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:30 p.m.
Processing closes:	9:30 a.m., 2:30 p.m. and 7:00 p.m.

4. INTENSIVE MANAGEMENT UNIT (IMU): By appointment only.

5. There will be no visits scheduled for Monday and Tuesday.

E. NUMBER OF VISITORS:

1. Limitations on the number of visitors who can visit an inmate at one time is ten persons to include children.

2. Further limitations on the number of visitors may be imposed to eliminate difficulties in supervising the visit.

F. PARKING:

1. All vehicles must park in the designated area posted for visitors in the lower lot below the entrance to the Main Gate.

2. Handicapped parking visitors can be let out of the vehicle in front of the visitor entry and the vehicle removed by a person accompanying them.

   Prior arrangements must be made one hour in advance of visits if the visitor is to be picked up by staff in a State vehicle in the parking lot. Notify Public Access Sergeant for arrangements.

3. Vehicle Search: A vehicle search may be conducted absent any reasonable suspicion that the visitor is transporting contraband or on a random basis. The visitor shall be present during such a search unless ownership of the vehicle cannot be established or there is a basis for proceeding with the search.

G. VISITOR ENTRY INTO INSTITUTION:

1. At the Main Gate, all visitors shall be required to properly identify themselves with legal picture identification, state they intend to visit, then walk directly to the Information Desk.

2. Unauthorized items will be put in lockers provided at the Main Gatehouse.

3. Items permitted in Visiting Area: Three (3) keys, $2.00 in coin for visitor and $2.00 in coin for inmate, legal picture I.D., clothing and diapers for infants.

4. All lockers are subject to search and may be inspected absent any reasonable suspicion or on a random basis.

5. No admission into the institutional grounds except by approved routes to and from the visiting area (area-posted Visitor Entry).

H. PROCESSING AT THE INFORMATION DESK:

1. Produce legal picture I.D. - All identification cards must be current and legal (Driver's License, State I.D. or Passport).

2. Register on the Visitor Registration Form provided for this entry. This form includes the name and address of the visitor, the relationship to inmate and the date of visit.

I. SEARCH OF VISITORS:

1. A large sign is posted in the Lobby stating "All Visitors are Subject to Search Prior to Being Allowed to Visit any Inmate."

2. All visitors shall be searched by a Metal Detector scanning device and pat searched.

3. If contraband is found on the person or in the clothing of a visitor, a full and complete Telephone Incident Report shall be submitted, the contraband confiscated and the visitor detained for law enforcement officials, if drugs or a weapon are found.

4. The visitor's refusal to be searched shall be sufficient cause for denial of visit.

5. Search procedure for Infants in Diapers:
All infants will have their diapers removed by the accompanying adult. The child will be placed in a thin material garment covering the area previously covered by the diaper. This procedure will be accomplished in the privacy of the search area. A search will be conducted on the child and adult along with all hand-carried items after the changing of the clothing. The officer will step out of the search area after conducting the search while the infant is re-clothed in a diaper. The officer will conduct another search of the room, hand-carried items and all visitors before visiting will proceed.

6. All containers, packages and hand-carried items which are authorized are subject to search.

7. Strip Search - A strip search will only be considered based on reasonable suspicion the visitor possesses contraband. A strip search must be authorized in writing by the Superintendent or his designee before the search can be performed. After it has been authorized, the visitor will be asked to consent in writing to the strip search. No strip search will take place without proper authorization. If the visitor refuses a properly authorized search, the visitor will be promptly escorted out of the facility or turned over to local law enforcement authorities. A refusal to be searched may be cause for future visiting restrictions as determined in individual situation. The strip search must be carried out in a private area by an employee of the same sex as the visitor being searched.

J. VISITORS DRESS STANDARD AND PROPERTY REGULATIONS:
The following standards are set forth for all visitors entering the institution:

1. Infants (babes in arms) may be clothed in diaper only, and any other garment commensurate with weather and temperature.

2. Children under six years of age may be dressed in sunsuit, shorts, or short pants, and similar clothing commensurate with weather and temperature.

3. Adults and children of six years or older - All clothing must be clean and presentable.

a. Clothing and Property Allowed:

1. Transparent blouses/dresses with slip/camisole. Cardigan hip-length sweaters are permitted in the visiting room as long as they are worn. If taken off in the Visiting Room, it is a violation of the visiting rules and will be handled accordingly.

2. Open footwear, such as sandals, is allowed. Only footwear that can be readily searched may be worn. Footwear must be worn at all times.

b. Property:

1. Picture identification card (Driver's License, State Identification Card or Passport), two car keys (door and ignition and one house key.

2. Visitors with children may bring one quiet small toy (non-metal).

3. Only visitors with children in diapers may bring the following items: Four (4) diapers, two (2) plastic bottles and a small "receiving type" blanket, no quilted blankets allowed. All items to be brought in a plastic sack to be readily searched. All clothing of children under six years of age must be able to clear a metal detector.

c. Clothing and Property NOT ALLOWED:

1. Clothing not allowed:
   - a. Dresses/blouses without sleeves, bare mid-riffs, extremely low-cut or backless, sheer clothing, cut-offs or shorts, dresses/shirts with slits, wrap-around and open button closures. Hemlines will be no shorter than one inch above the knee. All bib attire, jackets and unlined shirts or tops used as a jacket. Pockets in all garments must be complete (no openings). Any item which cannot be readily searched. Shoulder pads, tops which are not hip length, pants with banded ankle straps.

   - b. Headgear of any kind is prohibited. This includes, but is not limited to: Scarves, hats, caps, wigs, hairpieces, flowers, etc. The only exception is someone who must wear headgear for medical reasons. This person must produce a medical statement from his or her doctor. However, the headgear must be removed and searched by the Search Officer each visit.

   - c. Visitors are not allowed to wear coats, jackets, hooded sweatshirts, windbreakers, leg warmers, etc., into the Visiting Room. These must be hung in the coat rack provided in the Visiting/Reception Area.

   - d. Pants must be worn outside of ankle or long boots. Long boots must be taken off every time the visitor is processed. Boots which cannot be readily searched [illegible] are not permitted

2. Property Not Allowed:
   a. Paper currency (U. S. or Foreign), checks, money orders, credit cards or other negotiable instruments, cigarettes, pictures, letters of unauthorized items.

   b. Stuffed toys, games, crayons, puzzles, toy guns or knives and any other property not listed in the Property Allowed Section.

3. Due to changing fashions and security requirements, additonal instructions/limitations may be applied. Notice of these changes will be posted in the Visiting/Information Area, Inmate Library and made available to counselors. Policies will be updated as required.

K. VISITING ROOM BEHAVIOR AND RULES: (See Schedule A.)

VI. PROCEDURES:

A. List of approved Visitors

1. Each inmate shall submit to his Unit Counselor, a list of names and addresses of proposed visitors. Staff shall approve persons for an inmate's Visiting List in accordance with the following guidelines:

   a. List of approved visitors (only visitors who have completed the attached questionnaire and have been approved for visiting). (Schedule B)

   b. All persons under the age of 18 or over the age of 16 may be placed on an inmate's Visiting List by submitting a notarized signature from the legal guardian on the original Visiting Questionnaire.

   c. All inmates are allowed ten (10) persons on the Visiting List (married couples, Mr. and Mrs. will not be counted as one visitor).

   d. Parolees and Probationers (not under supervision) unless authorized by the Superintendent or his designee.

   e. All children must be accompanied by their parent or legal guardian. Any exceptions must be arranged through the inmate's Counselor.

   f. Visitors may only be on one Approved Visiting List at a time, except as provided in Section VI, Paragraph C, 5., b.

2. The inmate shall be given a copy of his Approved Visitors List upon request to his assigned Counselor.

3. When an individual is not approved, notice of, and reasons for the exclusion shall be given to the inmate who submitted the individual's name. The inmate may appeal the decision to the Superintendent or his designee.

4. Attorneys shall schedule visits to their clients at least 24 hours in advance, and will be admitted to the institution during regular working hours after presenting proper credentials and identification. They should be registered into the institution and be subjct to search procedures and all other rules and regulations of the institution.

   a. Attorney Provided Information:
      1. The Attorney's or Legal Aides' name
      2. Date and time of interview
      3. Inmate's name and DOC number
      4. Inmate's housing assignment

   b. All conversations between inmates and attorneys may be visually observed by supervising officers, but not overheard, recorded or listened to in any manner. All reasonable precautions shall be taken to preserve the confidentiality of the attorney/client relationship.

5. If a Special Visit is approved for inmates in Disciplinary Status, the visit shall be held in the No Contact Visiting Area.

6. Visits for inmates in the Hospital and/or medical isolation shall require the approval of the Health Care Manager. Depending upon the seriousness of the illness, visits for hospitalized inmates may be held in either the Hospital or the Visiting Area. If the inmate is able to walk to the Visiting Room, the visit will take place with population. Visits to inmates confined to the Medical Isolation Unit shall be conducted in the Hospital.

7. Visits for inmates confined to public (downtown) hospitals are not permitted, except by order of the Superintendent or his designee. Such visits shall be authorized only when the inmate's medical condition is deemed to be life threatening and shall be conducted under heavily supervised security conditions.

B. Frequency of Visits: Visits for the inmate population assigned to the Main Institution are rotated according to Units, Wednesday through Sunday, allowing for visits every third day for each Unit.

Visiting days and hours for the Medium Security Unit and Intensive Management Unit will be governed by the visiting procedures outlined in the Operational Procedural Manuals of those Units.

C. Termination & Suspension of Visits:

1. A visit may be denied or terminated and visiting privileges suspended under the following circumstances:

   a. Visitors under the influence of drugs or alcohol.

   b. Insufficient space available.

c. Refusal of visitor to submit to search procedures.

d. Refusal or failure to produce sufficient identification or the falsifying of identifying information by visitor.

e. Violation of institutional visiting rules by visitor.

f. Failure to prevent children from disturbing other persons in the Visiting Area.

g. Excessive physical contact or sexual activity by the visitor or inmate. On Contact Visits, an inmate and visitor may embrace or kiss briefly at the beginning and end of the visit. An inmate and visitor may hold hands during the remainder of the visit. These contact restrictions shall not apply to small children.

h. Other reasons for denying, terminating or suspending a visit as reasonably necessary to preserve the security of the institution and reasonable order in the Visiting Area.

i. Abusive language to staff and other visitors.

j. Any behavior that is offensive or disruptive.

2. Based on the information provided by staff, the inmate and/or visitor, the the Superintendent or h designee may remove an individual's name from an Approved Visiting List for a specified period, indefinitely or permanently. A written notice of the decision shall be given to the inmate and to the visitor. The statement of reasons may be deleted or limited in details.

3. A person shall not be denied permission to visit solely because of sex, marital status, status as an ex-offender, or having visited another inmate.

4. Visiting privileges shall be denied only by orders from the Superintendent or his designee. When the suspension is imposed as part of a formal disciplinary proceeding, the Superintendent or his designee will have final approval. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting.) A visitor who has had his/her visiting privileges suspended may submit written statements in opposition to the suspension.

5. Visitors may be removed from one inmate's Visiting List and placed on another when adequate justification is shown. The visitor must complete a new set of Visiting Forms and it must include a statement of the reason for the change. If, for any reason, a visitor is removed from a Visiting List by the inmate, they cannot be authorized to return to that inmate's Visiting List for six (6) months from the effective date of removal.

a. A visitor may apply no more than three times. Any request beyond the third time or any request not accompanied by adequate justification will be denied.

b. When a visitor or prospective visitor has more than one inmate who are immediate family members, the visitor may be on each of the inmate's Visiting List. Immediate family is defined as and limited to parents, stepparents, brothers, sisters or stepbrothers or sisters, children, stepchildren, grandparents. In this case, each inmate must complete and mail a separate Visiting Questionnaire to his immediate family.

c. In an indefinite suspension, the notice shall include a date when reapplication for visiting privileges may be made on behalf of the visitor.

D. Special Visits: Special Visits may be granted on a one-time basis where there is a special need which cannot be satisfied through normal procedures.

1. Special Visits by persons not on the Approved Visiting List, including prospective employers, sponsors, parole advisors or immediate family members traveling a long distance, shall be authorized by the inmate's Counselor, Correctional Unit Supervisor and Correctional Program Manager. These persons may be able to offer valuable assistance to inmates and shall be allowed to visit whenever possible.

2. Special Visit requests by persons on the Approved Visiting List must meet the following criteria:

a. They should not have visited within the last six months prior to the request of the visit.

b. The visitor should be coming from a distance of at least 300 miles. This does not mean a Special Visit will be based on distance alone. There must be a specific need related to the visit which cannot be satisfied on a normal visiting day for that Unit.

c. A local visit must be able to demonstrate significant and verifiable need. Normally, a local visitor will not be approved for a Special Visit.

d. Any Special Visits in conjunnction with regular visiting days shall not be approved automatically. There should be no population visits approved on Protective Custody days.

e. Any Speial Visit requested for a non-visiting day must be approved by a Correctional Program Manager, Captain, Duty Officer or higher.

f. Special Visit Request Forms will be approved or denied by the Counselor, Correctional Unit Supervisor and Correctional Program Manager, and delivered to the Information Desk Officer (Regular Visiting Days.)

g. At the Medium Security Complex, all Special Visits must be approved by the Correctional Program Manager.

E. Special Review/Consideration of Visiting: Any inmate or visitor may submit a letter of special consideration for review of visitation rights for any situation not covered in this policy. Such letter should be submitted to the Superintendent or his designee.

VII. REVIEW:

A. This order shall be reviewed annually by the Superintendent or his designee.

B. If there are modifications or changes they will be forwarded to the Deputy Director for review and approval.

APPROVED: ______________________ /DATE: 17 May 88
Superintendent, Washington State Penitentiary

APPENDIX C

WASHINGTON ADMINISTRATIVE CODE

WAC 275-80-930 Suspension of visiting rights--Duration. Visiting rights may be suspended for a single visitor or all visitors of a single resident depending on the seriousness of a visiting infraction. The visiting rights of a resident charged with violation of visiting rules may be suspended only after a finding of guilt pursuant to a regualr disciplinary hearing and such rights may be abridged for a maximum duration of 90 days after which visiting rights shall be restored unless there remains a clear and present, or imminent danger to the health and safety of any visitor, resident, or staff mamber.

[Order 814, Section 275-80-930, filed 6/28/73.]

NO. 92-579

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,

Petitioner,

V.

ROGACIANO GONZALES MENDOZA,

Respondent.

CERTIFICATE OF SERVICE

I, Maureen E. Laflin, a member of the Bar of this Court, hereby certify that on this 2nd day of November, 1992, one copy of Respondent's Brief in Opposition in the above-entitled case was mailed, first class postage prepaid, to Kathleen D. Mix, Sr. Assistant Attorney General, Attorney General's Office, Corrections Division, P.O. Box 40116, Olympia, WA 98504-0116, counsel for all the petitioners herein. I further certify that all parties required to be served have been served.

Maureen E. Laflin
University of Idaho
College of Law
Legal Aid, Room 10
Moscow, Idaho 83843
(208) 885-6541
Counsel for Respondent